United Nations A/HRC/32/39

General Assembly

Distr.: General
6 May 2016

Original: English

Human Rights Council
Thirty-second session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted pursuant to Council resolution 26/12. In the report, the Special Rapporteur presents a short commentary on the process of updating the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (known as the Minnesota Protocol) and surveys the standards for the use of force by private security providers in law enforcement contexts.

GE.16-07411(E)

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I. Activities of the Special Rapporteur

1. In October 2015, the Special Rapporteur submitted to the General Assembly a report in which he focused on the role of forensic investigations and the application of the death penalty to foreign nationals (A/70/304).

2. In June 2015, the Special Rapporteur presented to the Human Rights Council a thematic report on the use of information and communications technologies to secure the right to life (A/HRC/29/37).

3. On 9 March 2016, jointly with the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur presented to the Human Rights Council, pursuant to its resolution 25/38, a report on the proper management of assemblies (A/HRC/31/66).

4. On 22 March 2016, the Special Rapporteur presented an oral update to the Human Rights Council on the situation of human rights in Burundi in his capacity as a member of the United Nations independent investigation on Burundi, pursuant to Council resolution S-24/1.

A. Communications

5. Observations on the communications sent by the Special Rapporteur between 1 March 2015 and 29 February 2016 and replies received between 1 May 2015 and 30 April 2016 are contained in document A/HRC/32/39/Add.3.

B. Visits

6. From 8 to 18 September 2015, the Special Rapporteur visited Ukraine. His mission report is published as an addendum to the present report (A/HRC/32/39/Add.1).

7. The report in follow-up to the mission undertaken by the Special Rapporteur to Mexico from 22 April to 2 May 2013 is published as an addendum to the present report (A/HRC/32/39/Add.2).

8. From 1 to 8 March 2016, the Special Rapporteur visited Burundi as a member of the United Nations independent investigation on Burundi, pursuant to Human Rights Council resolution S-24/1 adopted on 17 December 2016. He has subsequently been appointed the chair of the investigation.

9. Since the presentation of his previous report to the Human Rights Council in June 2015, the Special Rapporteur has sent country visit requests to the Governments of Israel, Mozambique and the State of Palestine.

10. He thanks the Governments of Honduras, Iraq, Nigeria and the State of Palestine, which have responded positively to his requests, and encourages the Governments of Egypt, Eritrea, the Islamic Republic of Iran, Israel, Mozambique, Pakistan, Rwanda and Sri Lanka to accept his pending requests for a visit.

C. Press releases

11. On 21 April 2015, the Special Rapporteur joined in issuing a statement by special procedure mandate holders on the decision of the Supreme Court of Pakistan to suspend death sentences imposed by military courts.

12. On 29 April 2015, he joined in issuing a statement emphasizing the need to ensure transparency and accountability in the use of drones.

13. On 30 April 2015, he joined in issuing a statement warning about the consequences of pre-election violence in Burundi.

14. On 13 May 2015, he joined in issuing a statement condemning the killing of three bloggers in Bangladesh.

15. On 18 May 2015, he joined in issuing a statement calling for a central role for civil society to guarantee inclusive post-2015 development goals.

16. On 21 May 2015, he joined in issuing a statement welcoming the Indonesian, Malaysian and Thai leaders' decision not to push back migrants and asylum seekers arriving in their territorial waters.

17. On 5 June 2015, he joined in issuing a statement drawing attention to the grave harm climate change poses to the worldwide enjoyment of human rights.

18. On 3 July 2015, he issued a statement urging the Mexican authorities to consider new evidence in the Tlatlaya case.

19. On 16 July 2015, he joined in issuing a statement calling on the Security Council to take action to prevent mass violence in the Great Lakes region.

20. On 7 August 2015, he joined in issuing a statement condemning the killing of the blogger Niloy Neel in Bangladesh.

21. On 27 August 2015, he joined in issuing a statement warning about the increase in violence against journalists and media workers in South Sudan.

22. On 27 August 2015, he joined in issuing a statement calling for increased respect for the rule of law in the context of a genocide trial in Guatemala.

23. On 9 September 2015, he joined in issuing a statement welcoming the report of the Inter-American Commission on Human Rights on disappeared, executed and tortured students in the State of Guerrero in Mexico.

24. On 7 October 2015, on the occasion of World Day against the Death Penalty, he joined in issuing a statement on the use of the death penalty for drug-related crimes.

25. On 13 November 2015, he joined in issuing a statement welcoming the adoption of Security Council resolution 2248 (2015) on Burundi.

26. On 16 November 2015, he joined in issuing a statement expressing deep concern about ongoing bloodletting in the Occupied Palestinian Territory.

27. On 1 December 2015, jointly with other mandate holders, he called on the Turkish authorities to carry out a thorough, independent and transparent investigation into the killing of Tahir Elçi.

28. On 9 December 2015, he joined in issuing a statement on the occasion of the fiftieth anniversary of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights calling for the implementation of the two treaties.

29. On 21 January 2016, he joined in issuing a statement urging the Government of Ethiopia to halt the violent crackdown on Oromia protesters and ensure accountability for abuses.

30. On 1 March 2016, he joined in issuing a statement welcoming the judgment of two former military officials for crimes against humanity in Guatemala and calling on the authorities to ensure appropriate redress for the victims.

31. On 30 March 2016, he issued a statement on the alleged summary execution of a Palestinian in Hebron by Israeli security forces.

32. On 7 April 2016, the Special Rapporteur joined in issuing a statement welcoming the new Principles and Guidelines on Human Rights while Countering Terrorism in Africa, drafted by the African Commission on Human and Peoples' Rights.

33. During the reporting period, the Special Rapporteur joined in issuing other statements on the death penalty in Chad, China, India, the Islamic Republic of Iran, Pakistan, Saudi Arabia, the United States of America and Zambia.

D. International and national meetings

34. The activities carried out by the Special Rapporteur during the period from 14 April to 14 July 2015 are outlined in his report to the General Assembly at its seventieth session (A/70/304).

35. During the reporting period, pursuant to Council resolution 25/38, along with the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur continued consultations with States and civil society concerning the management of assemblies, in Pretoria (6-7 August 2015), Istanbul, Turkey (27-28 August 2015), and Geneva, Switzerland (22-24 October 2015).

36. On 4 and 5 September 2015, he participated in an experts meeting on a draft general comment on article 4 of the African Charter on Human and Peoples' Rights, organized jointly by his mandate, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the African Commission on Human and Peoples' Rights.

37. On 7 September 2015, he participated in a seminar on investigations during armed conflict, organized by the Geneva Academy of International Humanitarian Law and Human Rights.

38. On 21 October 2015, he visited the Metropolitan Police Specialist Training Centre, in Gravesend, the United Kingdom of Great Britain and Northern Ireland.

39. On 29 October 2015, he participated in a panel event in New York on the revision of the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

40. On 3 November 2015, he spoke in Banjul at the joint thematic dialogue on sexual orientation and gender identity organized by the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and the United Nations.

41. On 10 December 2015, he spoke at the launch in Geneva of *The War Report: Armed Conflict in 2014*.

42. On 3 February 2016, he participated in an expert meeting in Geneva on the use of force by corporate entities, aimed at informing the present report.

43. From 4 to 6 February 2016, he convened in Geneva two working groups (legal and forensic) on the revision of the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

44. On 5 February 2016, he presented an update in Geneva to States on the Minnesota Protocol.

45. On 9 March 2016, he participated in a side event in Geneva during the thirty-first session of the Human Rights Council on the use of force and social protest, organized by the International Network of Civil Liberties Organizations and Amnesty International.

46. On 6 April 2016, he participated in a panel discussion during the fifty-eighth ordinary session of the African Commission on Human and Peoples' Rights in Banjul, launching the Commission's general comment No. 3 on the African Charter on Human and Peoples' Rights: the right to life (art. 4).

47. On 14 April 2016, he spoke about human rights and ethical issues at the meeting in Geneva of experts on lethal autonomous weapons systems, organized by the States parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

II. Updating of the Minnesota Protocol

48. The Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions is one of the earlier founding documents of the mandate, adopted in 1991. For some time, the document has required updating and supplementing, as highlighted in several resolutions adopted by the Commission on Human Rights and reaffirmed by the Human Rights Council between 1998 and 2010.[1]

49. Given the input he received from many interlocutors during country visits and in thematic exchanges in the conduct of his mandate, the Special Rapporteur approached OHCHR and it was decided that they would collaborate in undertaking an update process.

50. The full process of the update over the previous two years is described in the Special Rapporteur's report A/HRC/32/39/Add.4, and the completed text is presented to the Council therein. The Special Rapporteur hopes that the updated Minnesota Protocol will become a helpful reference for crime scene and forensic experts, as well as other investigators, whose work makes a vital contribution to the protection of the right to life.

III. Right to life and the use of force by private security providers in law enforcement contexts[2]

51. The human rights system cannot be effective in the absence of security and, in some cases, without the use of force. The modern State typically claims a monopoly on the use of force, and as such is also politically responsible and internationally accountable for the force it uses or allows to be used. The power to exercise force is easily abused in any society. To avoid such abuses, those using force need to function within domestic legal frameworks on the use of force that comply with international human rights law and, where applicable, international humanitarian law. In addition, appropriate mechanisms for accountability need to be in place.

52. There is an increasing tendency for States to allow many of their traditional functions to be taken on or taken over by private operators, and security is no exception. Security provision has become a global marketplace, with private security providers

[1] See Commission resolutions 1998/36, 2000/32, 2003/33 and 2005/26 and Council resolutions 10/26 and 15/5.

[2] The Special Rapporteur is grateful for research assistance from Thomas Probert and Josua Loots, and advice from Stuart Maslen and other external reviewers.

guarding shopping malls, residencies and public streets, providing security during demonstrations, running prisons and detention centres, training armed forces and police, performing intelligence assessments and risk analyses, escorting convoys and ships, providing personal security for diplomats, and offering many other services.[3]

53. In previous reports, the Special Rapporteur has developed international standards relating to the use of force by law enforcement officials in the context of assemblies (A/HRC/17/28) and in the context of arrest (A/66/330). He has also reported on the need for proper domestic legislative frameworks on the use of force by the police (A/HRC/26/36). In the present report, he explores the implications of the privatization of security provision for the observance of those standards, and makes recommendations aimed at ensuring that standards protecting the right to life are not diminished through privatization.

54. In the present report, the Special Rapporteur focuses on the private provision of security services in law enforcement contexts. The use of force by private entities in the conduct of hostilities will not be discussed. The Special Rapporteur underlines the fact that the established rules of international humanitarian law about determining a situation as an armed conflict should be used. Not all uses of force in an armed conflict qualify as the conduct of hostilities. For example, the provision of close protection to a businessperson or diplomat in a State that is engaged in armed conflict does not ordinarily amount to direct participation in hostilities, and any use of force in such contexts should be evaluated with reference to domestic and international standards on law enforcement.

55. Throughout the present report, the Special Rapporteur uses the term "private security providers" to describe all those private parties providing security services, regardless of how they define themselves.

56. The provision of private security services on international waters, the use of private security providers to ward off pirates, on deep-water drilling platforms and in other contexts, are not analysed. That complex issue is worthy of a report in its own right.[4]

57. While many major private security providers have their headquarters in Europe and North America, the industry operates and employs people across the globe. G4S, the world's largest private security company, employs more than 623,000 people on six different continents, of whom more than three-fifths are in Asia, the Middle East and Africa.[5] However, although some of the larger private security providers clearly qualify as transnational corporations, a substantial segment of the market is made up of small- or medium-sized private security providers that may not operate internationally.

58. Certain international business and human rights norms may apply irrespective of the size, sector, operational context or ownership structure, including the Guiding Principles on

[3] See R. Abrahamsen and A. Leander, eds., *Routledge Handbook of Private Security Studies* (London and New York, Routledge, 2015). See also H. Born, M. Caparini and E. Cole, "Regulating private security in Europe: status and prospects", Geneva Centre for the Democratic Control of Armed Forces (DCAF), Policy Paper No. 20 (Geneva, DCAF, 2007), pp. 2-3.

[4] See "Counterpiracy under international law", Academy Briefing No. 1 (Geneva, Geneva Academy of International Humanitarian Law and Human Rights, 2012); Alice Priddy, "The use of weapons in counterpiracy operations" in *Weapons under International Human Rights Law*, S. Casey-Maslen, ed., (Cambridge, Cambridge University Press, 2014).

[5] See www.g4s.com/en/Who%20we%20are/Our%20people/Our%20employees/.

Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.[6]

A. Privatization of security services

59. The use of private entities for security or law enforcement is not a new phenomenon. Indeed, there is some evidence to suggest that the modern concept of professional, bureaucratic policing was pioneered by private firms such as the Pinkerton Detective Agency and its competitors during the mid-nineteenth century.[7] However, the private security sector is certainly rapidly expanding.[8] In 2011, the Small Arms Survey conducted a study comparing the number of private security personnel in 70 countries with the number of police officers. Several countries stood out, including Guatemala, with 6 times as many private security personnel as police officers, India, with nearly 5 times as many, South Africa, with more than 2.5 times as many, and the United States of America, with 2.26 times as many.[9]

60. The privatization of State security services has steadily been increasing over recent years, and the establishment of public-private partnerships in the area is not uncommon.[10] There are several arguments supporting the privatization of public functions or services.[11] Security may be privatized where government lacks the capacity either technically or materially to perform its duties, or in certain circumstances it may be cheaper to privatize certain functions than for governments to perform them themselves.[12]

61. Private security services provide some benefits, as far as the protection of life, limb and property is concerned. At the same time the sector presents major challenges. Since States are primarily responsible for human rights fulfilment, the increasing movement toward the privatization of security raises questions as to roles, responsibilities, and ultimately accountability in relation to human rights violations and abuses. The Danish Institute for Human Rights has raised concerns about the trend towards privatization, noting that "the logic of privatization suggests that states can distance themselves from responsibility by simply firing the company in question".[13] Moreover, there is concern that privatization could have a discriminatory impact because poor or marginalized communities cannot afford the private services and are left underprotected.[14]

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[6] C. Seiberth, *Private Military and Security Companies in International Law* (Cambridge, Intersentia Ltd., 2014), p. 25.

[7] D. Sklansky, "The private police", *University of California Los Angeles Law Review*, vol. 46, No. 4 (April 1999), p. 1182.

[8] See A. Sinha and P. Chatterjee, "Calling security", *Business World* (5 January 2016). Available from http://businessworld.in/article/Calling-Security/05-01-2016-89925/.

[9] See N. Florquin, "A booming business: private security and small arms" Small Arms Survey 2011. Available from www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2011.html.

[10] M. Mota Prado "Regulatory choices in the privatization of infrastructure" in S. Chesterman and A. Fisher, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford, Oxford University Press, 2009), p. 108.

[11] M. Mota Prado "Regulatory choices in the privatization of infrastructure", p. 109.

[12] International Institute for Strategic Studies, "Complex irregular warfare: the privatisation of force", *The Military Balance*, vol. 106, No. 1 (June 2006), pp. 411-416.

[13] See IRIN, "Private security firms prosper as more migrants detained", 12 March 2014. Available from www.irinnews.org/report/99766/private-security-firms-prosper-as-more-migrants-detained.

[14] See, for example, J. Cavallaro, "The urban poor: problems of access to human rights", paper presented at the sixth annual assembly of the International Council on Human Rights Policy,

62. The right to life has two components: the prevention of arbitrary deprivation of life, and accountability where life may have been arbitrarily deprived. The growth of the private security provider sector brings to the fore the question of whether private security providers adhere to the same standards as public security regarding the use of force, and whether the same level of accountability is in place should there be abuses of power. Concerns about private security providers centre on the level of training for the security guards, vetting procedures and practices in the selection process of employees, their mandates, whether they are issued with weapons and, if so, which ones, the risk of abuse of authority and excessive use of force, the level of professional standards, the adequacy of legal accountability mechanisms, and compliance with existing laws.[15]

63. All States that play a role in the deployment of private security providers, whether home State, host State or contracting State, must contribute to regulating the activities of the private security provider to ensure accountability.[16] The draft articles adopted by the International Law Commission in 2001 on the responsibility of States for internationally wrongful acts identify four instances when the acts of a private entity may be directly attributed to the State: (a) when the private entity is "empowered by the law of that State to exercise elements of the governmental authority … [provided that entity] is acting in that capacity in the particular instance" (art. 5); (b) when the private entity is "acting on the instruction of, or under the direction or control of, that State in carrying out the conduct" (art. 8); (c) when the private entity is "in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority" (art. 9); and (d) when a "State … acknowledges and adopts the conduct in question as its own" (art. 11).

64. When private security providers are tasked by the State to perform protective functions or other forms of law enforcement, and empowered to use force in that capacity, the State remains primarily responsible for their compliance with international human rights law.[17] However, in practice, the uncertainties that can arise in a transnational context concerning regulation of public-private partnerships often result in an accountability deficit.[18]

65. The State has a duty to respect and protect human rights, including the public's rights to bodily integrity: the rights to life, bodily security and the right to be free from cruel, inhuman or degrading treatment or punishment. In order to achieve that goal there is an obligation on the State to install regulative and legislative frameworks that protect the human rights of those under its jurisdiction or control. When it comes to the regulation of private security providers, the State has a duty to provide a regulative framework that ensures that private security providers act in a manner respectful of human rights, and are held accountable in instances in which they do not, regardless of whether the contracting

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Guadalajara, January 2003, paras. 20-23. See also Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights* (2009), paras. 70-73. Available from www.cidh.oas.org/countryrep/Seguridad.eng/CitizenSecurity.IV.htm.

[15] United Nations Office on Drugs and Crime, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety* (Vienna, United Nations, 2014), p. 21.

[16] O. De Schutter, "The responsibility of States", in *Private Security, Public Order*, p. 26.

[17] The Special Rapporteur notes that this was the position taken by the two rapporteurs of the Human Rights Committee in preparing draft general comment No. 36 on the right to life in September 2015.

[18] Michael Likosky "The privatization of violence" in *Private Security, Public Order*, p. 16.

party is the State itself.[19] Given the context in which private security providers often work, it is important to underline that those responsibilities can also apply extraterritorially.[20]

B. International efforts at regulation and oversight

66. A great many mechanisms now exist at the international level aimed at regulating or monitoring the actions of private security providers. Meanwhile, an emerging regime of soft law regulations and codes of conduct are aimed at improving oversight, control and accountability in the sector, especially for those working in so-called "complex environments", areas experiencing or recovering from unrest or instability, where the rule of law has been substantially undermined, and in which the capacity of the State authority is diminished or non-existent.

67. The Voluntary Principles on Security and Human Rights were established in 2000 to guide companies in maintaining the safety and security of their operations. The principles are limited to the extractive industries and energy sectors, but apply to private security providers insofar as they provide services for such corporations. Among the voluntary principles on private security conduct is the principle that private security entities should act in a lawful manner and should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials, as well as with emerging best practices developed by companies, civil society and governments.

68. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination was established in 2005. Its mandate included monitoring and studying the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, and preparing draft international basic principles that encouraged respect for human rights on the part of those companies in their activities. After developing a draft international convention on the regulation of private military and security companies, the Working Group has been conducting a global assessment, on a regional basis, of national laws and regulations relating to such companies (see A/HRC/24/45, A/HRC/27/50 and A/HRC/30/34).

69. The draft convention on private military and security companies was presented in 2010, at which time the Council established an open-ended intergovernmental working group to consider the possibility of developing an international regulatory framework, including the option of drafting a legally binding instrument on the regulation, monitoring and oversight of private military and security companies. The working group has discussed gaps in the current regulatory framework because very few States have specific legislation on such companies. Efforts to ensure regulation through voluntary self-regulatory mechanisms are still being rolled out (see A/HRC/WG.10/3/2, para. 52).The working group is currently exploring both a legally binding instrument for private military and security companies and considering a range of other options, including international standard-setting and developing guidelines (A/HRC/30/47).

70. In a separate initiative, the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and

[19] See Guiding Principles on Business and Human Rights, principle 2.

[20] B. S. Buckland and A. M. Burdzy, *Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants*, 2nd ed. (Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2015), pp. 23-25.

security companies during armed conflict was adopted in 2008. It focuses on situations of armed conflict, but can be of broader use, and supports States in their efforts to ensure that such companies comply with international human rights and humanitarian law. It does not create any new legal obligations, and is not necessarily a step towards a new treaty; rather, it serves as a guiding document. Part two of the document identifies good practices aimed at guiding States in the regulation of private military and security companies. As at May 2016, 53 States and 3 international organizations had expressed support for the Montreux Document.[21]

71. Another voluntary initiative was the development of the International Code of Conduct for Private Security Service Providers, a multi-stakeholder initiative aimed at establishing principles and standards for the provision of private security services. In September 2013, it also established an external independent governance and oversight mechanism, the International Code of Conduct for Private Security Service Providers' Association, with the aim of improving accountability in the sector. Its membership has three independent pillars: private security providers, States and intergovernmental organizations, and civil society. The core functions of the Association are the certification of member companies, monitoring and assessment of compliance with the Code itself, and receiving and handling complaints. It enables reviews and follow-up on corporate performance, and can also provide an avenue for third party complaints, although at present that opportunity is very limited as the Association does not have the necessary resources to investigate complaints. The Code applies primarily to the activities of member private security providers in complex environments. However, it is also relevant to other stakeholders in terms of defining expectations and performance standards in relation to contracting policies and practices.

C. General observations on the use of force

72. With respect to the use of force, where they provide detail, those frameworks tend to defer to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials. The Basic Principles, in accordance with the definition provided in the commentary to the Code of Conduct, are designed to provide standards for use of force by all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

73. However, the Basic Principles do not apply directly to the personnel of private security companies, who do not have official law enforcement powers, unless they have, exceptionally, received such powers from the competent authorities. In particular, they do not apply to private security personnel working for private companies, since they are not carrying out State functions.[22]

74. The remainder of the present report, however, turns to the question of whether there are specificities relating to the use of force by private security providers in that context, and whether the same standards can be adapted for private security providers operating on behalf of another private corporation. When not in the exceptional circumstance of working directly for the State, private security personnel have the same legal rights and responsibilities as ordinary citizens, but the level of their organization, their asserted

[21] See www.mdforum.ch/en/participants.

[22] Amnesty International, *Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Amsterdam, Amnesty International, 2015), p. 14.

expertise, and their preparedness to use force, all suggest that their conduct, particularly whether any use of force is reasonable and not excessive, should be judged more strictly.

75. As is the case for State agents, before and during any use of force by private security personnel, all reasonable precautionary steps to protect life and prevent excessive violence must be taken, including the provision of appropriate equipment and training, the proscription of inappropriate weapons, and careful planning of individual operations. States must adopt a clear legislative framework for the use of force by law enforcement or other individuals that complies with international standards, including the principles of necessity and proportionality. The intentional lethal use of force by law enforcement officials or others must be prohibited unless it is strictly unavoidable in order to protect life, making it proportionate, and all other means are insufficient to achieve that objective, making it necessary. After any use of force there should be some form of review, with a full investigation wherever life has been lost or serious injury inflicted, and accountability mechanisms in place where such an investigation suggests the use of force may have been unlawful, including remedies for victims.

76. As noted above, where States choose to devolve some of their responsibilities for the provision of security to private entities, it is clear that those actions are attributable to the State, and that at least the same restrictions apply to private security providers operating in such a context as would apply to State law enforcement personnel. In the sections that follow the Special Rapporteur turns to situations in which the standards are perhaps less authoritative, but, he argues, must remain normatively identical, if practically distinct.

D. Duty of precaution as applied to private security providers

77. In many cases, once a situation arises in which the use of force is considered, it is already too late to prevent force needing to be used. In order to save lives, all possible measures should be taken "upstream" to avoid situations in which force needs to be used, or to ensure that if force is required, the damage is contained as much as is possible. A failure to take proper precautions in such contexts, where life is at risk, constitutes a violation of the right to life (see A/HRC/26/36, paras. 63 and 64).

78. The precautionary principle is now well established for State law enforcement, although it has different content to the analogous principle in international humanitarian law.[23] In the present section, the Special Rapporteur identifies the many analogous responsibilities that private security personnel have, and by implication the responsibilities that other entities, including States, have to ensure that standards are met.

79. Those responsible for the use of force by any entity must ensure that personnel receive proper training, including in "less-lethal techniques". The Working Group on mercenaries reported that, even when countries had regulations on training of private security personnel, they almost never included any training on human rights (see A/HRC/27/50, paras. 17 and 47). Seeking certification from a recognized body to ensure and demonstrate compliance with established standards will contribute to the adherence of private security providers to the precautionary principle.

80. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials require that governments and law enforcement agencies develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. The Principles

[23] See International Committee of the Red Cross, "The use of force in law enforcement operations" (2015). Available from www.icrc.org/en/document/use-force-law-enforcement-operations.

also stipulate that, for the same purpose, it should be possible for law enforcement officials to be equipped with self-defensive equipment. Not only should the equipment be used if available, as required by necessity, but such equipment should be made available in the first place. States should also ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force (see A/HRC/26/36, para. 52). The same requirements should be made of private security providers, including specialized equipment or training for the particular contexts in which their personnel may work.

81. According to the United Nations Office on Drugs and Crime (UNODC), a significant number of States worldwide allow civilian private security personnel to be armed with firearms or other potentially lethal weapons. The use and regulation of weapons in that context also varies greatly, ranging from situations where 2 per cent of private security providers are estimated to be armed in countries like Croatia, India and Sweden, to instances where 80 per cent are armed in the Dominican Republic, and 85 per cent in Colombia.[24] The importance of strict regulation of possession and use of firearms is self-evident. This requires registration of weapons at the level of the company, and also with respect to the individual responsible. Moreover, there should be adequate regulations in place to ensure that firearms are stored in secure places and that they are well controlled by the company.[25] It is of great concern that, where private security personnel are permitted to carry firearms, their training in safe and effective use of such weapons is not standardized or, in many cases, regulated at all. Even when legal requirements exist regarding the vetting and training of private security personnel, they often merely indicate that the provider is responsible for ensuring that employees are properly trained.[26]

82. The potential consequence of insufficient weapons training was highlighted in December 2015 in Pakistan, when a private security guard accidentally discharged his weapon inside a multinational bank, killing one of the bank personnel and wounding another.[27] Moreover, the risks of allowing private security personnel to carry and potentially use weapons when off-duty were illustrated when a security guard employed by GardaWorld shot and killed two men in a fast-food restaurant in Canada during his break in January 2015.[28]

83. However, as noted above, fatal abuses do not occur only in situations where private security providers are armed or weapons are used. In 2004, a 15-year-old boy died in a youth prison in the United Kingdom after being restrained by private security guards.[29] In

[24] UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety* (2014), p. 43. Available from www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf.

[25] Born, Caparini and Cole, "Regulating private security in Europe" (see footnote 3 above), p. 27.

[26] Florquin, "A booming business: private security and small arms" (see footnote 9 above), pp. 123-124.

[27] See M. Raja, "No weapons training: Bank staffer dies after guard's gun goes off 'accidentally'", *Express Tribune*, 18 December 2015. Available from http://tribune.com.pk/story/1011999/no-weapons-training-bank-staffer-dies-after-guards-gun-goes-off-accidentally/.

[28] See J. Edmiston, "Toronto police won't charge security guard who shot and killed two men at Danforth McDonald's", *National Post*, 15 July 2015. Available from http://news.nationalpost.com/news/toronto-police-wont-charge-security-guard-who-shot-and-killed-two-men-at-danforth-mcdonalds.

[29] See C. Sambrook, "G4S guard fatally restrains 15 year old – gets promoted", *Open Democracy*, 22 July 2013. Available from www.opendemocracy.net/ourkingdom/clare-sambrook/g4s-guard-fatally-restrains-15-year-old-gets-promoted. See also BBC News, "Criticism over youth jail death", 28 June 2007. Available from http://news.bbc.co.uk/1/hi/england/6250406.stm.

2010, an Angolan deportee died of a heart attack after being restrained by three security guards.[30] In both cases, the detainees reportedly shouted that they could not breathe.

84. The responsibility to plan an appropriate operational response to an emerging situation applies as clearly to private security providers as it does to State law enforcement. However, in the case of private security providers there exists an additional potential precautionary step, namely to call upon the State's law enforcement personnel. In circumstances where private security providers resort to force having turned down an opportunity to defer to the State's police, their full compliance with the requirements of precaution would be called into question. In circumstances where help from authorities was forthcoming, private security providers can no longer justify the use of force under the principle of self-defence or defence of others.

85. Unless directly contracted by the State to do so, which is itself problematic, the contractual responsibility of private security providers in the context of assemblies is not to facilitate the right to freedom of peaceful assembly, but rather to protect the property or personnel of the contracting party. The protection of the rights and safety of the public more broadly remains the duty and function of the State. Private security providers should defer to properly trained and equipped specialist law enforcement units wherever possible.

E. Operational conduct of private security providers

86. The two standards generally applied at the instant of an operation or exchange of force are necessity and proportionality. In the present section, the Special Rapporteur considers whether there are particularities to the application of those standards to the use of force by private security providers.

87. Necessity is a factual cause and effect assessment that evaluates whether force should be used at all, and if so, how much force is actually unavoidable in order to achieve the desired outcome. The requirement of necessity raises the question of whether the threat could not be averted by resort to less harmful means and, thus, implies a graduated approach to the use of force. Therefore, any use of force can be regarded as necessary only when it constitutes the least harmful means available at the time that can be expected to achieve the desired outcome.

88. The proportionality requirement relates to the question of whether the benefit expected to result from the use of force, that is, neutralizing a threat, justifies the harm likely to be caused by it. While establishing necessity requires a factual cause-and-effect assessment, demanding that the least harmful means be used to achieve a desired effect, proportionality entails a value judgment that balances harm and benefit, demanding that the harm that might result from the use of force is proportionate and justifiable in relation to the expected benefit.

89. As far as the right to life is concerned, the proportionality requirement demands that the use of firearms is permissible only if the purpose is to protect another life from a threat, and is sometimes called the "protect life principle". The use of lethal or potentially lethal force to protect property or assert State authority does not meet the proportionality requirement.

90. Given that they are cumulative requirements, proportionality can place a ceiling on the level of force that may be considered necessary, and vice versa. For example, it may be

[30] See BBC News, "Jimmy Mubenga: Deportee shouted 'you're killing me'", 4 November 2014. Available from www.bbc.com/news/uk-england-london-29902375.

"necessary" to shoot a fleeing thief if that is the only way to stop him or her from escaping, in an objective cause-and-effect assessment. However, thus injuring the thief would not be "proportionate", because it would amount to an excessively harmful means of stopping a comparatively minor crime (a value judgment).

91. In some jurisdictions, such as the United States, every citizen, including private security personnel, has the right to make an arrest in certain circumstances. However, importantly, a citizen's arrest must always be made at the arrester's own risk: if the arrest proves unlawful, the arrester is subject to criminal or civil liability. In all circumstances, the amount of force that can lawfully be used in making an arrest largely depends on the type of offence, but the general rule is that force cannot exceed the extent of resistance offered.

92. On account of their organized character, and the training that, as a matter of regulation, they must have received, those using force as part of a private security provider should be subjected to stricter scrutiny than other members of the public as to whether they have met the legal standards. In that context, the Special Rapporteur is concerned that the existence of Stand Your Ground laws can give licence for private security providers and other essentially private entities to seek out confrontation where safe retreat is a viable option, and as such are not in accordance with the precautionary principle (see, for example, CCPR/C/USA/CO/4, para. 10).

93. That organizational characteristic implies that those high up a chain of command or authority, including those not present at the event in question, can potentially be held accountable for use of force by private security personnel. The different level and mechanisms of accountability for such abuses are discussed below.

F. Particular contexts and challenges

94. Having discussed the nature of the standards that can be applied to private security providers in a law enforcement setting, in the present section the Special Rapporteur addresses certain contexts in which the use of force by private security providers can be particularly problematic.

1. Private security providers and detention

95. States are increasingly making use of private security providers as part of their correctional services. A 2013 report found that in at least 11 countries, there was some form of prison privatization, with detention services provided by private security providers for 8 per cent of the prison population in the United States and 19 per cent in Australia.[31]

96. In 2001, the Bureau of Justice Assistance of the United States identified the use of force as a potential reason not to privatize detention facilities, owing to the uncertainties around the deprivation of liberty and the preservation of the rights of inmates when private entities are involved.[32]

[31] See C. Mason, *International growth trends in prison privatization* (Washington, DC, The Sentencing Project, 2013). Available from http://sentencingproject.org/doc/publications/inc_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf.

[32] See J. Austin and G. Coventry, "Emerging issues on privatized prisons", Bureau of Justice Assistance, February 2001. Available from www.ncjrs.gov/pdffiles1/bja/181249.pdf.

97. In a recent incident in the United Kingdom, at a juvenile detention centre managed by G4S, private security personnel improperly used force on several of the young inmates.[33] Undercover film footage appears to show that the guards tried to conceal their behaviour by ensuring that the incidents took place in areas where the surveillance equipment in the detention centre could not film them. That raises concerns about potential undocumented and underreported abuses of the same nature. Following the incident, the Chief Inspector of Prisons of the United Kingdom announced that all prison officers dealing with children should wear cameras in order to monitor behaviour.[34]

98. In 2015, in Australia a bill was tabled before Parliament giving Serco, a private security company contracted by the Australian Department of Immigration and Border Protection to run the country's immigration detention facilities, greater discretion and power to use force in the management of the facilities. The Australian Human Rights Commission raised concerns, citing several incidents about which it had received complaints in relation to the conduct of private security providers in the management of detention centres.[35] As part of their responses to the significantly higher flow of refugees into Europe over the previous year, several European States have also been making use of public-private partnerships to manage temporary asylum facilities. In September 2014, the German press published images exposing abuse in one such facility, raising questions about how staff had been recruited and trained.[36]

99. In the context of detention it is worth re-emphasizing that any serious injury or death that occurs in custody merits a full investigation. When the State deprives an individual of liberty, its control of the situation, directly or indirectly, yields a heightened level of responsibility to protect that individual's rights. That includes a positive obligation to protect all detained persons from violence, as well as to provide food, water, adequate ventilation, an environment free from disease, and adequate health care.[37] Where a person dies or suffers serious injury in custody, there is a presumption of State responsibility, and the burden of proof rests upon the State to prove otherwise through a prompt, impartial, thorough and transparent investigation carried out by an independent body.[38]

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[33] See BBC News, "G4S Medway young offenders centre staff suspended over abuse claims", 8 January 2016. Available from www.bbc.com/news/uk-england-kent-35260927.

[34] See D. Barrett, "All child jailers should have body-worn cameras after G4S Medway scandal, says watchdog", *Telegraph*, 26 January 2016. Available from www.telegraph.co.uk/news/uknews/law-and-order/12121948/All-child-jailers-should-have-body-worn-cameras-after-G4S-Medway-scandal-says-watchdog.html.

[35] See Australian Human Rights Commission, "Use of force in immigration detention facilities", August 2015. Available from www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention-facilities.

[36] See "Asylum seekers abused in German shelter by security contractors", *Deutsche Welle*, 28 September 2014. Available from www.dw.com/en/asylum-seekers-abused-in-german-shelter-by-security-contractors/a-17960732. See also "Systemic shame", *Der Spiegel*, 6 October 2014. Available from www.spiegel.de/international/germany/abuse-case-reveals-terrible-state-of-refugee-homes-in-germany-a-995537.html.

[37] See African Commission on Human and Peoples' Rights, "General comment No. 3 on the African Charter on Human and Peoples' Rights: the right to life (article 4)", 2015, para. 36.

[38] See African Commission on Human and Peoples' Rights, "General comment No. 3", para. 37. See also the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 71, and African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), paras. 20-21.

2. Impact on the State's duty to provide security

100. In its study of regulatory frameworks for private security providers (A/HRC/27/50), the Working Group on the use of mercenaries noted that in some cases legislation explicitly prevents private security providers from performing policing functions. For example, in the Democratic Republic of the Congo, private security providers are permitted to provide protection to persons and property insofar as they do not replace the police, but they are prohibited from patrolling, arresting, carrying and using firearms, special devices and any other material normally reserved for the military and the police. Similar provisions are contained in the laws of Morocco and Tunisia.

101. However, there also appear to be instances, as the Special Rapporteur observed in Papua New Guinea, in which private security personnel significantly outnumber the police, and as a result, in some circumstances, start de facto to take on some of the core responsibilities of the police with respect to protection (see A/HRC/29/37/Add.1). Such a situation could become particularly problematic where, as noted above, there are differing accountability frameworks for the two groups.

102. To the extent that the provision of security by private security providers supplements that provided by the State, it ought to increase overall levels of security, and therefore protection of the right to life. However, States should guard against reinforcing any trend towards discriminatory security, to which private security providers may contribute.

3. Private use of private security providers

103. There are several contexts in the corporate sector where the overlap between private and public can be problematic, such as mass labour protests or disputes, or other mass gatherings taking place on or around private property, where the corporation involved may choose to employ a private security provider for security provision. As noted above in the context of assemblies, or other activities that take place on the border of public and private, either physically or conceptually, it is important to bear in mind that private security providers have a very different mandate and set of priorities to the police. As such, the police should be called in whenever uncertainties exist with regard to private and public interests, especially concerning the use of force in such contexts.

104. A further level of complexity is added when a private corporation employs security guards, sometimes using a recognized private security provider to recruit the personnel, but the private corporation itself is a company of a different type, such as an extractive industry. It is important to underline that the standards described above with respect to training, equipment, or the use of force apply to all security personnel, regardless of the main function of the company employing them. In circumstances in which a recognized private security provider has been used to recruit staff, there can also be confusion about the chain of command and decision-making, the clarity of which is an important element of precaution. The use of certified security providers can contribute to greater precaution in that regard.

G. Monitoring and accountability

105. Accountability processes when a violation has potentially occurred represent a vital part of the protection of the right to life. With respect to a globalized and transnational industry such as the private security sector, it is important to ensure that accountability exists at the international and domestic (judicial) levels, and at the internal (company) level.

1. Monitoring the use of force

106. Often the first step in any process of accountability is effective monitoring of levels of use of force. That necessary step remains sadly incomplete in many contexts with respect to the use of force by State law enforcement. However it is even less complete in the case of the use of force by private security providers. That data gap fundamentally undermines the work of national and international efforts to ensure accountability for human rights abuses.

107. In order for any organization that uses or potentially uses force for the purpose of security provision demonstrably to respect the right to life, there must be a system of mandatory reporting of all incidents involving the use of firearms, all deaths, and any serious injuries.[39] It is good practice that such a system also requires mandatory reporting of potentially lethal incidents.

2. Accountability under international law

108. While States play the primary role in international law, particularly with regard to law-making and international legal responsibility, and while the regulation and scrutiny of the private security sector may primarily be a question for domestic law, that does not mean there can be no international element.[40] International human rights law does not exclusively govern the conduct of States; it has been variously confirmed that it is the nature of the conduct, and not the entity, that will determine whether or not international human rights law is applicable.[41]

109. Against the backdrop of uncertainty around the exact role that corporations play in the international legal context, there is consensus that corporations should at the very least respect human rights.[42] There is increasing support for the view that non-State collective entities have a binding obligation to obey *jus cogens* and not to engage in conduct amounting to international crimes (see, for example, A/HRC/19/69, para. 106). Along with that come links between human rights and corporate social responsibility, which incentivizes companies to take into account principles that include human rights, labour, the environment and anti-corruption.

110. Under current best practice, unlawful conduct on the part of private security providers is addressed either directly through international corporate social responsibility frameworks and voluntary, self-regulatory codes of conduct aimed at implementing the corporate responsibility to respect human rights, or by holding States accountable where they fail to provide realistic options to hold private security providers and individual personnel accountable under domestic civil and criminal law.

111. Of the voluntary frameworks perhaps most notable is the International Code of Conduct for Private Security Service Providers, which seeks to facilitate access to remedy through the creation of its independent governance and oversight mechanism, as well as the

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[39] See the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principles 6, 11(f) and 22.

[40] R. Steinhardt, "Weapons and the human rights responsibilities of multinational corporations", in *Weapons Under International Human Rights Law*, S. Casey-Maslen, ed. (Cambridge, Cambridge University Press, 2014), pp. 509 and 513-514.

[41] *Kadic v. Karadzic*, 70 F.3d 232 (United States Court of Appeals, Second Circuit, 1995), cert. denied 518 US 1005 (1996); *Sosa v. Alvarez-Machain*, 542 US 692 725 (2004), p. 748.

[42] N. Pillay "The corporate responsibility to respect: a human rights milestone", *International Labour and Social Policy Review* (Geneva, 2009), pp. 63-68.

forthcoming complaints process.[43] Whether or not the complaints procedure of the International Code of Conduct for Private Security Service Providers' Association will be able to provide effective access to remedies for victims of human rights abuse by private security providers remains to be seen.

3. Accountability under domestic law

112. Human rights abuses perpetrated by private security personnel can be redressed under criminal law and, in some instances, as part of tort law or the law of delict. That can raise questions regarding the legal personality of companies and the different doctrines applied when establishing corporate liability. Some States, such as the United Kingdom, have explicitly codified corporate criminal liability, while others rely on general tort law and the law of delict to institute civil claims.

113. Nothing should detract from the pursuit of personal criminal liability of the individual perpetrator of the abuse. However, vice versa, the fact that sufficient evidence cannot be gathered to prove a criminal act does not mean that an abuse has not occurred.

114. In certain circumstances the concept of vicarious criminal liability can be helpful. A corporation can be criminally responsible for conduct, distinct from the owners, agents or employees of the corporation. The application of vicarious liability transfers the criminal responsibility for an offence from an agent or employee to the corporation itself, while the agent or employee remains responsible for the crime committed. Essential elements of corporate criminal liability include a special relationship between the agent or employee and the corporation (namely, employment) and the requirement that the crime must have been committed in the performance of duties in terms of that relationship. Attention must also be given to considerations of the liability of parent companies for abuses committed by their subsidiaries.[44]

115. It should be noted that, given the inherent risks of abuse of rights associated with security work, close attention should be paid to the trigger of liability concerned. It can be argued that private security providers should be held to a modified standard of strict liability as might be expected from a company, for example, handling hazardous waste. Laws should not grant a company the right to exculpate itself from intentional or grossly negligent excessive force resulting in death or serious injury, even if the company can show that the employee concerned was appropriately selected and trained. Without that standard of liability, victims will often have no effective recourse, as the individual perpetrator is often devoid of means.

116. Since many private security providers operate on a global level, the extraterritorial applicability of human rights law, and specifically human rights treaties, is crucial to the regulation of the sector. In the context of business, extraterritorial jurisdiction has in one way or another made its way into a number of policy domains that include anti-corruption, securities regulation, environmental protection and more general civil and criminal jurisdictions, but not in relation to business and human rights (see A/HRC/14/27, para. 46).[45] However, international law does not prevent States from extending their jurisdiction

[43] The processes put in place for the reporting, monitoring and assessment of members' performance in accordance with the code of conduct were established under article 12 of the Association.

[44] See G. Skinner, "Parent company accountability: ensuring justice for human rights violations" (International Corporate Accountability Roundtable, November 2015). Available from http://icar.ngo/wp-content/uploads/2015/06/PCAP-Report-2015.pdf.

[45] See J. Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas", Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA,

to include such issues, provided there is a recognized basis. Moreover, the Guiding Principles on Business and Human Rights highlight that there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially when the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.[46] While the extraterritorial scope of a prominent national example, the Alien Tort Statute in the United States, has recently been limited, there are a number of other potential avenues, such as in the European Union, that allow for extraterritorial claims to be pursued against corporations for human rights abuses.[47]

4. Internal accountability mechanisms

117. As part of the due diligence aspect of the Guiding Principles on Business and Human Rights, companies are encouraged to set up internal grievance mechanisms, also referred to in some instances as "operational-level" or "project-level" grievance mechanisms. The mechanisms are usually set up to allow those that are affected by the actions of the company to bring allegations of non-compliance with internal policies and procedures to the attention of the company. Several of the voluntary initiatives, including the International Code of Conduct for Private Security Service Providers, also require companies to set up internal grievance mechanisms to monitor compliance with the principles of the initiatives, considered to be external unless incorporated into those of the company.[48] Notwithstanding the potential of internal grievance mechanisms to offer another course of redress to victims of corporate human rights abuse, the functioning of those mechanisms has met with great scepticism in the ranks of civil society.

118. Most internal grievance mechanisms currently require claimants to sign a legal waiver that keeps victims from pursuing further legal action.[49] While the use of such grievance mechanisms has produced some successes in particular circumstances, human rights abuses of certain magnitudes, including violations of the right to life, cannot be adequately addressed through an internal grievance mechanism, and in such cases legal waivers can represent a deliberate impediment to accountability.

IV. Conclusions

119. **The use of force by private security providers is not uncommon, and can be a necessary element to some of the services they provide. However, the unregulated or improper use of force by such providers can severely jeopardize the protection of the right to life. Where the use of force by private security providers is regulated under the domestic laws and regulations of States that specifically concern private security,**

John F. Kennedy School of Government, Harvard University, 2010). Available from www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

[46] See Guiding Principles on Business and Human Rights, principle 2.

[47] J. Kirshner, "A call for the EU to assume jurisdiction over extraterritorial corporate human rights abuses", *Northwestern Journal of International Human Rights*, vol. 13, No. 1 (2015), pp. 1-26.

[48] See International Code of Conduct for Private Security Service Providers, article 66.

[49] See "Rape victims must sign away rights to get remedy from Barrick", *MiningWatch* (30 January 2013). Available from http://miningwatch.ca/news/2013/1/30/rape-victims-must-sign-away-rights-get-remedy-barrick. See also K. McVeigh, "Canada mining firm compensates Papua New Guinea women after alleged rapes", *Guardian*, 3 April 2015. Available from www.theguardian.com/world/2015/apr/03/canada-barrick-gold-mining-compensates-papua-new-guinea-women-rape.

there is a need to ensure that those laws are in line with international human rights standards and best practice regarding the use of force. More generally, private security providers must be subject to oversight and accountability from the State.

120. Where States directly contract security services from a private security provider, the standards and level of the State's responsibility for the actions of its agents must remain unaffected. Where private corporations or individuals contract a private security provider, or where corporations provide their own security, the standards remain effectively the same, a fact that should be clarified by national legislation. States must impose on private security providers and their personnel a duty of precaution concerning recruitment, training, equipment, planning, command and control, and reporting. Moreover, in circumstances they assess as likely to require the use of force, private security personnel have a responsibility to inform State law enforcement, and to follow any instructions they are given.

121. It is vital that States, the security industry and civil society all take steps to address the data gap with respect to lethal incidents relating to the use of force by both State law enforcement and private security personnel. Without reliable information about the use of force by all entities potentially involved it will be difficult for States and the international community to assess the impact of the privatization of security on the full realization of the right to life by all, without discrimination.

V. Recommendations

Recommendation to the United Nations

122. The Human Rights Council should continue to pay significant attention to the impact of private security providers on a broad range of human rights, including the right to life, and to underline the important principle that the outsourcing of security provision must in no way lower standards of protection.

Recommendation to regional human rights mechanisms

123. Where they do not already exist, regional human rights mechanisms should consider establishing forums or frameworks to allow greater scrutiny of the activities of the security sector in the regional context.

Recommendations to States

124. States should keep registers of and issue licenses to private security providers operating within their borders, or domiciled within their territory and operating across borders, that have demonstrated compliance with requirements established by legislation.

125. States should actively participate in and engage with international organizations and multilateral and multi-stakeholder processes aimed at improving the monitoring and regulation of private security provider activities.

126. States should, where necessary, engage in a process of legal and policy reform to achieve the following:

(a) Clarify the responsibilities of private security providers in relation to human rights when operating both locally and abroad, particularly when the private security provider is registered or domiciled within its territory;

(b) Require that all private security providers have vetting and training procedures that include human rights norms and principles;

(c) **Require that appropriate weapons training is mandatory for all private security personnel;**

(d) **Implement strict gun control regulations with regard to private security personnel, both on and off duty;**

(e) **Require private security providers based or operating within their territory to bring company policies in line with international norms and standards;**

(f) **Implement a system of mandatory reporting of lethal incidents, whether caused by State law enforcement or private security personnel and, where one does not already exist, establish a transparent system for collecting, analysing and publishing the data thus generated;**

(g) **Pass or amend laws to ensure that private security personnel who are found to have used excessive force are criminally accountable and that, in such circumstances, the private security provider itself is held to a standard of strict vicarious liability that ensures victims receive compensation;**

(h) **Clarify their responsibilities in monitoring effectively the use of force by private security providers and providing access to remedy for victims of corporate human rights abuses, particularly in cross-border operations, and ensure that there are no barriers to access to remedy for victims of corporate human rights abuse, both procedurally and in relation to legal bases.**

127. **Where the State itself is directly contracting security services from a private security provider, it must conduct due diligence with respect to the private security provider's human rights record, and pay particular attention to procedures and equipment relating to the use of force; States should also engage robust mechanisms to monitor the performance of the private security provider in that regard.**

Recommendations to private security providers

128. **All private security providers should operate in a transparent fashion and publish reports on their activities; they should conduct investigations into allegations of human rights abuses in a transparent and thorough manner.**

129. **In particular, private security providers should record and publish data on incidents involving the use of force by their personnel.**

130. **All private security providers should actively participate in and engage with initiatives aimed at fostering respect for human rights among their personnel, including awareness-raising and capacity-building; private security providers are encouraged to align internal policies with international human rights norms and standards, and to put in place the protocols necessary.**

131. **All private security providers must engage in vetting and training exercises that include a human rights-based approach; they should monitor the use and safekeeping of weapons by both on and off-duty personnel. They should implement oversight and monitoring mechanisms, especially in relation to the use of force by their personnel.**

132. **While private security providers should set up internal grievance mechanisms for injured parties of misconduct or negligence on the part of the provider, such mechanisms should not be used to address serious abuses of human rights, including violations of the right to life, and must not require applicants to waive their right to seek a judicial remedy where applicable.**

133. **All private security providers should actively participate in and engage with international multi-stakeholder initiatives aimed at improving the human rights performance of the security sector.**

Recommendations to corporations contracting private security providers

134. **The provision of security, especially in circumstances where the use of force is a likely component of its provision, requires particular skill sets and hundreds of hours of training. Any non-State entity providing that service must be able to demonstrate that its personnel have been properly vetted, trained and equipped.**

135. **When tendering a contract for security services, corporations should require that the private security providers they contract abide fully with national regulations regarding private security, and give weight to accreditation by international certifying bodies. They must also exercise due diligence in monitoring the private security providers' activities once contracted to ensure respect for international human rights standards.**

136. **Contracting corporations must in no way impede oversight of private security providers they contract by external bodies, either during routine conduct or, particularly, during the investigation of alleged abuses.**

Recommendations to civil society organizations and academia

137. **Consider innovative ways in which civil society can help to fill the data gap concerning the incidence of the use of force both by State security personnel and private security providers, while at the same time encouraging the State to fulfil its obligations in that regard.**

138. **Scholars should consider how the outsourcing of security creates discriminatory hierarchies of public security that adversely affect human rights, and whether those hierarchies amount in practice to a failure of the State in its duty to protect the right to life of all of its citizens.**

United Nations A/HRC/32/39/Add.1

General Assembly

Distr.: General
4 May 2016

Original: English

Human Rights Council
Thirty-second session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Ukraine

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his official visit to Ukraine from 8 to 18 September 2015. In the report, the Special Rapporteur presents his main findings, including comments on the legal framework concerning the protection of the right to life, and concerns regarding the absence of accountability for violations in the context of demonstrations in 2014 and during the conduct of the armed conflict in eastern Ukraine.

The Special Rapporteur makes recommendations to all parties to the conflict, to the Government, to the international community and to civil society to prevent unlawful killings and ensure better protection of the right to life.

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Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Ukraine*

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* Circulated in the language of submission and in Russian only.

I. Introduction

1. At the invitation of the Government of Ukraine, the Special Rapporteur conducted an official visit to the country from 8 to 18 September 2015. The Special Rapporteur thanks the Government for extending the invitation, as well as for the open and cooperative approach of the officials with whom he met. He also thanks the United Nations Human Rights Monitoring Mission in Ukraine for its invaluable support.

2. During the visit, the Special Rapporteur held meetings in Kyiv, Zaporizhzhya, Mariupol, Donetsk, Kramatorsk, Kharkiv and Odesa.

3. The Special Rapporteur met with representatives of the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Defence, the Ministry of Internal Affairs, the Office of the Military Prosecutor, the Security Service of Ukraine, the Headquarters of the Anti-Terrorism Operation, the National Security and Defence Council, the High Specialized Court on Civil and Criminal Cases, the Parliamentary Committee on Human Rights and the Parliamentary Commissioner for Human Rights (Ombudsperson), including her national preventive mechanism.

4. The Special Rapporteur also met with representatives of the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission to Ukraine, the General Consulate of the Russian Federation in Odesa and other international and national monitors, non-governmental organizations and civil society, as well as with the families of victims.

5. After crossing the so-called "contact line" and traveling to Donetsk, the Special Rapporteur met with representatives of various monitoring missions, the "office of the commissioner for human rights" ("ombudsperson") of the self-proclaimed "Donetsk people's republic" and the "bar association". He regrets that, despite significant efforts on the part of the United Nations Human Rights Monitoring Mission in Ukraine to arrange meetings, no other representatives of the self-proclaimed "Donetsk people's republic" would meet with him. He shares the concerns of the Mission about the lack of accountability for the grave human rights violations and abuses that have reportedly taken place in the territories controlled by the armed groups. The Special Rapporteur was also able to visit the outskirts of the city of Donetsk, including the area surrounding the airport, and to see with his own eyes the extensive damage caused, particularly to civilian infrastructure and domiciles, by heavy shelling.

6. The Special Rapporteur regrets that he was unable to visit the Autonomous Republic of Crimea and the city of Sevastopol,[1] the status of which has been determined by General Assembly resolution 68/262. He was aware of allegations of serious violations of human rights in that territory, and reiterates that, in order to ensure the protection of all human rights, including the right to life, international missions such as the United Nations Human Rights Monitoring Mission in Ukraine should be given unimpeded access to this area. When meeting with the consulate of the Russian Federation in Odesa, the Special Rapporteur underscored the need for such visits to take place.

[1] Henceforth referred to as "Crimea".

II. Background

7. In late November 2013, large-scale street protests took place in Ukraine, triggered by the decision of then-President Viktor Yanukovych not to sign an association agreement with the European Union. Underlying these protests appear to have been growing popular discontent related to the deterioration of economic and social conditions, widespread dissatisfaction with a system perceived as corrupt and lacking accountability, and weak rule-of-law institutions (see A/HRC/27/75, para. 3).

8. The grievances were exacerbated by the disproportionate use of force by security personnel. The violence reached a breaking point in mid-February 2014, when firearms were used against demonstrators, killing 77 people.[2] The lack of a proper investigation contributed to a lack of clarity around these events, with profound consequences for Ukraine. Shortly afterwards, Mr. Yanukovych was forced to step down and left the country, his Government was deposed and an interim Government formed on 27 February 2014.

9. In March 2014, the crisis broadened when paramilitary groups, so-called self-defence groups and other unidentified soldiers—widely believed to be from the Russian Federation[3]—took control of Crimea, and on 16 March organized a "referendum" in which voters were asked whether they wanted the "reunification" of Crimea with the Russian Federation or the "restoration" of the 1992 Constitution of the Autonomous Republic of Crimea. When, according to the de facto authorities, that poll returned a large majority in favour of unification with the Russian Federation, they signed an agreement with the Russian Federation on 18 March. In its resolution 68/262 of 27 March 2014, the General Assembly affirmed its commitment to the sovereignty and territorial integrity of Ukraine within its internationally recognized borders, and underscored that the referendum had "no validity". There are concerns that individuals could not exercise their right to freedom of expression and peaceful assembly, and there were credible allegations of harassment, arbitrary arrest, torture and targeting of activists and journalists who opposed the referendum (see A/HRC/27/75, para. 5). Serious human rights abuses against those opposing the process, including Crimean Tatars and pro-Ukrainian leaders, have continued since then.[4]

10. Also beginning in March 2014, as a result of the change of Government in Kiev, and the unification of Crimea with the Russian Federation, rallies were held, mainly in the eastern regions of Donetsk, Kharkiv and Luhansk, and in the south, notably in Odesa, which are predominantly inhabited by Russian-speaking Ukrainians. The main demand of these rallies was a referendum on the federalization of Ukraine or the union of certain regions with the Russian Federation, as well as recognition of Russian as a second state language. Supporters and opponents of that protest movement regularly clashed, with the first three deaths resulting on 13 and 14 March 2014.

11. Armed groups seized public buildings and police and security facilities across the Donetsk and Luhansk regions, setting up barricades and checkpoints in order to maintain control of the areas seized. On 13 April 2014, the Government announced the beginning of

[2] See report of the Council of Europe International Advisory Panel on its review of the Maidan investigations, available from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680702f038b, para. 95.

[3] See Office of the United Nations High Commissioner for Human Rights (OHCHR), report on the human rights situation in Ukraine, 15 April 2014, para. 6.

[4] See OSCE, report of the Human Rights Assessment Mission on Crimea (6-18 July 2015), para. 10, available from www.osce.org/odihr/180596?download=true.

an "anti-terrorist operation".[5] The situation rapidly escalated into an armed conflict between government forces and these armed groups.

12. The Government of Ukraine has accused the Russian Federation of deploying its troops in the Donetsk and Luhansk regions, of attacking Ukrainian armed forces both from across the border and from within Ukraine, and of providing weapons and military training to the armed groups. OSCE monitors have observed the flow of persons in military-style clothing between Donetsk and the Russian Federation.[6] Many of the Special Rapporteur's government interlocutors alleged that the intervention of the Russian Federation was to blame for the loss of life and other human rights violations caused by the conflict. While repeatedly denying any involvement of regular Russian troops in Ukraine, the President of the Russian Federation did admit unspecified military participation of the Russian Federation in the conflict, indicating that "We never said there were not people there who carried out certain tasks, including in the military sphere",[7] and congratulating the separatist armed groups for their "major success".[8]

13. In certain districts of Donetsk and Luhansk regions under their control, the armed groups proclaimed the independence of the "Donetsk people's republic" and the "Luhansk people's republic" on 7 April 2014 and 27 April 2014, respectively. The armed groups held referendums for independence in the territories they controlled on 11 May, in the absence of international observers. Those referendums were not recognized by the Government of Ukraine. Since then, the United Nations Human Rights Monitoring Mission in Ukraine has observed a significant deterioration in the security and human rights situation throughout the conflict area, marked by grave violations of international human rights law and international humanitarian law on both sides of the conflict (murder, abductions, forced disappearances and torture and arbitrary detention of journalists, activists and other citizens), looting, social and economic hardship, the proliferation of illegal armed groups (both under and outside the control of the Ukrainian army and the self-proclaimed "Donetsk people's republic" and "Luhansk people's republic"), internal displacement and widespread impunity.[9]

14. On 25 May 2014, while presidential elections were being held in the rest of Ukraine, the populations of the Donetsk and Luhansk regions were prevented from exercising their vote by armed groups. The escalation in hostilities in urban areas between heavily armed men—allegedly including citizens of the Russian Federation and other foreigners—and Government forces caused grave violations of human rights and international humanitarian law, took a heavy toll on civilians and caused the internal displacement of 1,776,000 people, according to the Government of Ukraine.

15. Like other international observers, the Special Rapporteur welcomes the renewed ceasefire commitment announced in late August 2015 and the fact that this had been largely observed from 1 September 2015 until the time of his visit, and since.

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[5] Statement of the Ministry of Foreign Affairs of Ukraine on launching a full-scale anti-terrorist operation, 13 April 2014, available from http://mfa.gov.ua/en/news-feeds/foreign-offices-news/21529-terminovo-zajava-mzs-ukrajini-pro-pochatok-masshtabnoji-anti-teroristichnoji-operaciji.

[6] Weekly update from the OSCE Observer Mission at Russian checkpoints Gukovo and Donetsk, available from www.osce.org/om/220211.

[7] Shaun Walker, "Putin admits Russian military presence in Ukraine for first time", *The Guardian*, 17 December 2015.

[8] "President of Russia Vladimir Putin addressed Novorossiya militia", statement by the Government of the Russian Federation, 29 August 2014, available from http://en.kremlin.ru/events/president/news/46506.

[9] OHCHR, report on the human rights situation in Ukraine, 15 May 2014.

16. In June 2014, a trilateral contact group (Ukraine, the Russian Federation and OSCE) was established to facilitate dialogue between the various parties. On 5 September 2014, the group signed the Minsk Protocol, which included a ceasefire agreement and a 12-point peace plan, including the monitoring of the ceasefire by OSCE. On 19 September 2014, the Protocol was followed by a memorandum, which set the parameters for the implementation of the Protocol. The agreements, however, failed to prevent a new escalation of armed hostilities, which reached their peak between mid-January and mid-February 2015. A new ceasefire was agreed on 12 February 2015 as part of a package of measures for the implementation of the Minsk agreements, and entered into force on 15 February. The package of measures foresees the withdrawal of heavy weaponry from the "contact line"; the establishment of a 50-140 km security zone; the withdrawal of all foreign armed formations, military equipment and mercenaries from the territory of Ukraine; the disarmament of all illegal groups; and an "all for all" release of "hostages and unlawfully detained persons". On 17 February 2015, in its resolution 2202 (2015), the Security Council called on all parties to fully implement the package of measures.

17. The Special Rapporteur notes that among the package of measures is a provision to enact legislation ensuring "pardon and amnesty" by forbidding prosecution or punishment in relation to events that have taken place in certain districts of the Donetsk and Luhansk regions. While supportive of measures aimed at de-escalating tensions, the Special Rapporteur is concerned that such legislation may foster impunity for grave violations of human rights by all parties. Any amnesty devised should be interpreted as not including immunity at least for international crimes, such as war crimes and crimes against humanity.

III. Legal framework

18. Ukraine is a state party both to the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which (in their articles 6 and 2, respectively) both protect the inalienable right to life. The ultimate responsibility for the protection of the right to life in any country lies with its Government.

19. The right to life is protected in article 27 of the Constitution of Ukraine, which states that no one may be arbitrarily deprived of life and that it is the duty of the State to protect human life. Arbitrary deprivation of life is also penalized by several articles of the Criminal Code of Ukraine.[10]

20. On 7 November 2015, after the Special Rapporteur's visit, the Law on National Police entered into force. The Law regulates the use of physical force, firearms and special equipment (which were previously covered by Government regulations), authorizes the use of force by the police only when necessary and proportionate, and requires police officers to inform their supervisors in writing of each incident in which physical force, firearms or special equipment has been deployed. The supervisor is also obliged to inform the relevant prosecutor. The Law establishes that the police have the obligation to give prior warning before using force, with the exception of cases in which a warning would be "unreasonable or impossible" (art. 43 (1)). The Law on National Police also includes an obligation for police officers to display their identification numbers at all times.

21. While the normative framework, including national legislation and international standards, is largely adequate for the protection of the right to life in Ukraine, its

[10] See arts. 110, 114 (1), 115, 116 and 118 of the Criminal Code.

implementation remains highly problematic. In particular, there is a systematic lack of accountability for violations of the right to life.

22. Since 2014, the situation in certain districts of the Donetsk and Luhansk regions has triggered the applicability of international humanitarian law, in addition to international human rights law. The Special Rapporteur received reports of widespread violations of human rights in Crimea, including violations of the rights to freedom of expression, peaceful assembly and movement. He also received reports of concerns regarding the treatment of minorities. The Special Rapporteur regrets that monitoring of the human rights situation in Crimea is currently limited.[11]

23. Whether the allegations of the involvement of the Russian Federation in support of the armed groups in eastern Ukraine would in fact internationalize the conflict in certain districts of the Donetsk and Luhansk regions is a discussion that remains outside the scope of the present report. Regardless of the character of the conflict, all parties (including non-State actors) remain bound at least by customary international law, common article 3 of the Geneva Conventions of 12 August 1949 and the general principles of distinction, necessity and the prohibition on causing unnecessary suffering.

24. The framing of the conflict as an anti-terrorism operation has led to considerable confusion among observers and monitors—and in some cases, it seems, among the participants themselves—about what domestic and international legislation applies, and who within the Government—the police, the intelligence services, or the army—is in control of the armed actions of the Government in eastern Ukraine. This contributes to uncertainty with regard to responsibility, and how accountability should be achieved.

25. On 5 June 2015, the Government of Ukraine announced that it would derogate from certain State obligations under the International Covenant on Civil and Political Rights[12] and the European Convention on Human Rights.[13] The envisaged derogation is with respect to the rights to liberty and security, fair trial, effective remedy, respect for private and family life and freedom of movement, to be applied in certain districts of the Donetsk and Luhansk regions.[14] The derogation thus includes certain rights (including effective remedy and procedural rights, such as the supervision by judicial bodies of the lawfulness of detention) that the Human Rights Committee interprets as non-derogable. In relation to his mandate, the Special Rapporteur is concerned that these elements of the derogation may create an environment in places of detention that may facilitate incommunicado or secret detention, torture, ill-treatment, disappearances or executions. On 27 November 2015, the Government of Ukraine wrote a communication to the Secretary-General of the United Nations clarifying the geographic scope of its derogation from certain provisions of the International Covenant on Civil and Political Rights. The Special Rapporteur is concerned that it includes a number of large towns and cities that remain under the effective control of the Government, such as Kramatorsk, Krasny Lyman, Sloviansk and Mariupol in the Donetsk region; and Lysychansk, Rubizhne and Severodonetsk in the Luhansk region.[15]

[11] OSCE, Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015).

[12] See https://treaties.un.org/doc/Publication/CN/2015/CN.416.2015-Eng.pdf.

[13] See https://wcd.coe.int/ViewDoc.jsp?id=2331761&Site=DLAPIL-Conventions.

[14] The Government of Ukraine also made clear its view that the Russian Federation had committed an armed aggression against Ukraine and was "fully responsible" for ensuring respect of human rights and humanitarian law in Crimea and the areas of eastern Ukraine under the control of the armed groups.

[15] OHCHR, report on the human rights situation in Ukraine, 16 November 2015 to February 2016, paras. 166-167.

IV. Cooperation with international and regional organizations

26. On 15 March 2014, the United Nations Human Rights Monitoring Mission in Ukraine established by OHCHR initiated its activities in Kyiv at the invitation of the Government of Ukraine and in accordance with General Assembly resolution 68/262 of 27 March 2015 on the territorial integrity of Ukraine. The Mission has since extended its presence to Dnipropetrovsk, Donetsk, Kharkiv, Kramatorsk and Odesa, and also monitors the human rights situation in Crimea (albeit without a presence on the ground).

27. On 21 March 2014, the Permanent Council of OSCE decided to deploy a Special Monitoring Mission to Ukraine, with a mandate that includes gathering information on the security situation, as well as monitoring and supporting respect for human rights and fundamental freedoms. The OSCE Special Monitoring Mission has an extensive network of monitors and presences across Ukraine.

28. Ukraine has committed to accepting the jurisdiction of the International Criminal Court, and signed the Rome Statute in 2000, but a technical constitutional impediment has delayed ratification. The Special Rapporteur was assured that this impediment would be overcome in the proposed reform of the constitution, but in the meantime he welcomed the fact that on 8 September 2015 the Government had sent a declaration to the Office of the Prosecutor of the International Criminal Court under article 12 (3) of the Rome Statute, giving to the Court ad hoc jurisdiction "for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014". The Prosecutor confirmed that she would open a preliminary examination in order to establish whether the criteria for opening an investigation had been met.[16]

V. Securing the right to life in wider Ukraine

29. International attention is paid mostly to the loss of life and other human rights violations that are occurring in certain districts of the Donetsk and Luhansk regions and Crimea. However, such attention should also be directed to other parts of the country.

A. Securing the right to life in the context of assemblies

30. A range of rights, in addition to the right to peaceful assembly, protects those who participate in assemblies (see A/HRC/31/66). Even if an assembly turns violent and the right to peaceful assembly no longer applies, the other rights remain in place. The right to life, for example, continues to apply during any assembly.

31. Officials with whom the Special Rapporteur met conveyed their understanding that the principal role of the police within the context of assemblies was to protect citizens. They pointed out that only in rare circumstances would police be sent carrying firearms to manage an assembly. Currently, the parliament of Ukraine is discussing new draft legislation on the right to peaceful assembly.

32. On at least two occasions in the recent history of Ukraine, however, the State has failed in its responsibility to manage large-scale assemblies appropriately, in both cases leading to a loss of life that has become emblematic of the current situation in Ukraine:

[16] See www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx.

1. Maidan protests

33. Massive public gatherings and anti-Government demonstrations are not a new phenomenon in Ukraine. In 2004, large protests led to the Orange Revolution. In November 2013, protesters started to gather at Kyiv's Independence Square as part of a movement known as *EuroMaidan* ("European Square"), which demanded economic, social and political reform, the curbing of corruption and the strengthening of the rule of law. To some protesters, a closer integration with the European Union was seen as a desirable development, as they perceived the Government to be leaning progressively towards the Russian Federation. In eastern Ukraine, other citizens showed their support of the Government and expressed their opposition to ties with the European Union. On 24 November 2013, between 50,000 and 100,000 anti-Government protesters, including pro-European-Union sympathizers, gathered in the first demonstration at Independence Square in Kyiv. Pro-Government groups, including violent gangs (known as *titushky*) allegedly hired by the Government to "attack and intimidate" anti-Government demonstrators, also gathered at the square.[17]

34. The first instance of excessive use of force against demonstrators took place on 30 November 2013, when 290 riot police officers (special police unit known as the *Berkut*) dispersed protesters—mainly students and other young people—from the Square. Witness testimony and footage of the incident suggest that authorities used excessive force to clear demonstrators, including by chasing and beating demonstrators who ran away.[18] The violence escalated in the following days, with clashes in nearby streets between demonstrators and riot police. At least 50 riot police and hundreds of protestors were injured, and 12 persons detained on charges of "organizing mass disorder". Confrontations on 10 and 11 December 2013, after the riot police attempted to remove barricades, left up to 40 persons injured and 15 hospitalized, including law enforcement officers.[19] Clashes resumed on 19 January 2014, following the adoption of controversial new laws on 16 January limiting the ability to conduct unsanctioned public demonstrations.[20] Demonstrators, many of whom were linked to the far right-wing Right Sector group, attacked governmental buildings, throwing stones, firecrackers and Molotov cocktails at the police. The response of the police included the use of water cannons in sub-zero temperatures and live fire, as a result of which two demonstrators were injured by firearms.[21]

35. A Council of Europe panel[22] commissioned to assess the subsequent investigation found no evidence of meaningful investigation into any allegation of excessive force before 18 February 2014.[23] Over and above the failure of accountability that this represents, such a lack of investigation during the early period of the demonstrations inevitably meant that full investigations, once started, were hampered by the lapse of time.

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[17] See report of the Council of Europe International Advisory Panel on its review of the Maidan Investigations, para. 5.

[18] Ibid., paras. 9-23. The Advisory Panel referenced videos that seem to show instances of excessive force against the demonstrators.

[19] Ibid., para. 44.

[20] See OHCHR, report on the human rights situation in Ukraine, 16 August to 15 November 2015, para. 56.

[21] Report of the Council of Europe International Advisory Panel on its review of the Maidan investigations, paras. 53-57 and annex IX.

[22] See www.coe.int/en/web/portal/international-advisory-panel.

[23] See report of the Council of Europe International Advisory Panel on its review of the Maidan Investigations, para. 522.

36. The violence in Kyiv reached its peak between 18 and 20 February 2014, when mass violent clashes took place mainly on Institutska Street. During those three days, around 90 people were killed, including 13 policemen, some by sniper shots that allegedly came from rooftops. It is not known who those snipers were, or to whom they answered. Investigations into this aspect of the violence have not reached any meaningful result, although it appears that this violence led to the largest number of intentional deaths and injuries. The former Minister of Health (who was in office from 27 February 2014 until 1 October 2014), Oleg Musii, was the chief of the medical services in the Maidan protests and a witness to the episodes of violence against demonstrators. He indicated to OHCHR that he saw law enforcement officers secretly removing bodies from Independence Square, which he suspected belonged to individuals who remain unaccounted for. He recounted cases of police brutality, including beatings and intimidation against medical staff, which prevented them from tending to the wounded (see A/HRC/27/75, para. 57). According to information gathered thus far, during the period from December 2013 to February 2014, in total 123 people lost their lives as a result of violence during the Maidan protests (some of them died in hospitals in March and June 2014). This number includes 106 persons with no connection to law enforcement (most of them protesters killed by firearms) and 17 officers of the internal affairs/police.

37. With respect to the use of force against protesters in the Maidan protests, most significantly between 18 and 20 February 2014, the Special Rapporteur is concerned that at least 77 persons were killed as a result of the firing of live ammunition, allegedly by *Berkut* and other law enforcement officers, at participants. As with any use of lethal force by police officers, it is vital that there be a prompt, thorough and impartial investigation into the events to establish whether the use of force was both necessary and proportionate.

38. The Special Rapporteur is greatly concerned by the apparent shortcomings of the investigation into these events.[24] While what process there is seems to be progressing very slowly, having reached court-level proceedings now in a very limited number of cases, there are more systemic failings. The escape of a principal suspect from house arrest, as well as the loss of a great deal of vital physical evidence, are both issues that should themselves be independently investigated.[25]

39. The Law on National Police was adopted on 2 July 2015 and fully entered into force on 7 November 2015, triggering the creation of a new police force. The national police has been established as a separate central executive body tasked with the provision of police services, as an attempt to depoliticize the police and give it a service-oriented approach.

2. Events of 2 May 2014 in Odesa

40. The Special Rapporteur visited Odesa and sought further information about the events of 2 May 2014, in which at least 48 people died in the context of clashes between rallies of people of opposing political opinions, to which authorities appear to have reacted in a deliberate, ill-prepared or negligent fashion. According to the accounts received from people who were at the scene, the police kept a low profile as the crisis evolved, and did not intervene to prevent or stop the violence at the Kulykove Pole Square. Indeed, credible footage appears to show at least one armed "pro-federalist" protester shooting at "pro-unity" protesters from behind the police cordon, with no attempt being made to arrest him. Police officers present at the scene allegedly responded to repeated requests by protesters to intervene to stop the violence that they had no orders to do so.

[24] Ibid.

[25] Ibid., paras. 421, 443, 449 and 471.

41. In the immediate aftermath of these clashes, some protesters retreated into the Trade Unions Building, which was situated close to one of the protest camps. After barricading themselves inside, dozens of people were ultimately killed, both by assailants and by a fire that engulfed the building. The fire brigade, which was located very close to the Trade Unions Building, where many protestors burned to death, failed to respond for 45 minutes to repeated, urgent calls that they received. According to the Government, emergency department officials are under investigation for criminal negligence due to the alleged failure to fulfil their duties.

42. There were numerous failings in the official investigation into the events of that day. While both "pro-unity" and "pro-federalist" groups played a part in the escalation of violence, subsequent criminal prosecutions for hooliganism or public disorder were initiated against participants in a partial fashion. Of the 48 persons killed, all but two were "pro-federalist" protestors. Of the 10 protesters who were detained, accused of "mass riot", and still on trial at the time of the Special Rapporteur's visit, all but two were also "pro-federalist". Two years after the events, none of those responsible for the 48 deaths has been convicted. According to the Government, five persons are currently in custody on charges of rioting, unlawful handling of weapons and murder in relation to the 2 May 2014 events.

43. Moreover, by allowing almost immediate access to the scene by "pro-unity" protesters, members of the public and municipal authorities, investigators lost a large proportion of potentially valuable forensic evidence. As in the case of the lethal violence used in Maidan, the Special Rapporteur is concerned that no serious effort has been made to preserve critical evidence, and that investigations into these important events have been slow, thus far failing to produce any tangible result.

44. The Special Rapporteur is also concerned by indications that the Government has in the past year significantly reduced the size of the team investigating these events, before the team has had an opportunity to report. The slow progress of the investigation and the lack of transparency with which it is being conducted have contributed to a great deal of public dissatisfaction and provided a fertile environment for rumour and misinformation. The special unit of the Ministry of Internal Affairs that is investigating the 2 May events cancelled an appointment to meet with the Special Rapporteur in Odesa at the last moment without explanation.

45. The Special Rapporteur met with a group of families of some of the victims of those events. He was concerned to learn that administrative and personal impediments had been imposed to prevent or discourage families from obtaining the status of suffering or affected persons before the courts, and that, unlike the Maidan investigation, authorities had taken no coordinated measures to keep the next of kin informed of the status of the investigation. He was greatly alarmed by reports that authorities were tolerating verbal and physical intimidation, both of families attending court proceedings and of the judges in those cases, not only outside the court building, but also inside the building and in the courtroom itself.

B. Securing the right to life in the context of detention

46. Though issues concerning the treatment of detainees fall more directly within the mandate of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, violence or other threats to life within detention facilities can lead directly to deaths for which the State has a heightened responsibility. For this reason, wherever possible, the Special Rapporteur visits places of detention during his country visits, to assess these threats first-hand.

47. It seems that the Office of the Ombudsperson and the national preventive mechanism created within it are relatively free to exercise their responsibilities to conduct unannounced visits to both pretrial detention facilities (SIZO) and penal colonies, and that this access provides an effective system of protection of the rights of detainees. Among the principal threats to life for detained persons in Ukraine are diseases such as tuberculosis and HIV. In the Donetsk region, for example, the rate of tuberculosis is allegedly 10 times higher in the prison population than in the general population. The Special Rapporteur welcomes the partnership between the Penitentiary Service and Médecins Sans Frontières, which provides specialized care to detainees with tuberculosis.

48. Detainees with whom the Special Rapporteur spoke had few complaints about conditions in the pretrial detention facilities. However, several made allegations of ill-treatment during earlier stages of their detention. There is a systematic pattern of complaints about ill-treatment at the hands of agents identified as members of the Security Service of Ukraine, whom one interlocutor described as "untouchable".

49. The Special Rapporteur found it very difficult to establish from any officials he met the locations at which it was possible that such abuses might have taken place, whether police temporary detention facilities or other sites. He could find no evidence of a system of oversight that could effectively investigate any abuses that might occur or protect detainees against them. The consequence of such a lack of oversight was that officials could operate with impunity up until the time that detainees were handed over to the SIZO.

C. Violence by armed militia groups

50. While the majority of the "volunteer battalions" are said to have, from a military perspective, now been incorporated into the formal structures of the Ukrainian Armed Forces or the Ministry of Internal Affairs of Ukraine (the National Guard or otherwise), there remain a number of potentially violent militias, such as the Right Sector, that acted seemingly on their own authority, thanks to a high level of official toleration, and with almost complete impunity, both in the Donbass region and in wider Ukraine.

51. Of particular concern is the extent to which these groups use violence or threats of violence to exert pressure on persons holding dissenting views, the judicial system and other mechanisms of accountability. The Special Rapporteur is concerned by cases of physical attacks on journalists, writers, defence lawyers and judges, including the cases of Oles Buzyna (who was killed in April 2015 in Kyiv)[26] and Serhii Dolhov (who was arrested or disappeared on 18 June 2014 by masked armed men in civilian clothes in Mariupol and whose whereabouts continue to be undetermined despite indications that he might have been killed).[27] The Special Rapporteur is also concerned at an apparent pattern of intimidation of lawyers and judges by civilian armed groups in connection with their defence or investigation work related to the violence of 2 May 2014.

D. Accountability for violations

52. In many of his meetings with officials, the Special Rapporteur tried to explore the mechanisms of accountability that exist in current or proposed legislation and how they should function. As noted above, he left with the impression that in many instances the

[26] See OHCHR, report on the human rights situation in Ukraine, 16 February to 15 May 2015, para. 67.

[27] Amnesty International, "Urgent action: newspaper editor abducted in East Ukraine", 5 September 2014, available from www.amnestyusa.org/sites/default/files/uaa21514.pdf.

formal processes exist or will shortly exist. However, he remains concerned that, with the exception of the Office of the Ombudsperson and its national preventive mechanism, these processes are not being effectively used. Indeed, even the national preventive mechanism, which appears to be achieving its objective as a preventive mechanism, cannot fully act as an accountability mechanism, since it can only make recommendations to the Office of the Prosecutor, which is not compelled to take up cases.

53. Several practising lawyers with whom the Special Rapporteur met identified the reluctance of the Office of the Prosecutor to take on certain cases, combined with the close relationship between the Prosecutor and the judicial authorities, as the principal impediments to pursuing allegations of ill-treatment on behalf of their clients.

VI. Right to life in conflict-affected regions of eastern Ukraine

A. General observations on the conduct of hostilities

54. As noted above, the Special Rapporteur welcomes the fact that there have been only limited violations of the ceasefire on either side of the "contact line" since 31 August 2015. He hopes that this ceasefire continues to hold and that it provides a space for more thoroughgoing de-escalation of the conflict.

55. Over the past 18 months, however, the conflict has exacted a heavy human price. On 3 March 2016, the United Nations Human Rights Monitoring Mission in Ukraine released its latest report on the human rights situation in Ukraine, estimating that at least 9,167 people had been killed and more than 21,044 injured in the course of hostilities.[28] More than 1,000 persons remained missing, underlining the importance of identification and communication regarding the deceased in the context of armed conflict.[29] The Special Rapporteur applauds the work that the International Committee of the Red Cross and others are undertaking to provide training and technical assistance to all sides with respect to searching for, recovering and identifying mortal remains.

56. The majority of these deaths have been caused by shelling, which it would appear has taken place indiscriminately on both sides or without the taking of adequate precautionary steps to protect civilians.

57. The Special Rapporteur is also concerned by allegations that the conflict is being waged in part with inherently indiscriminate weapons, such as cluster munitions and landmines, including anti-personnel mines. Researchers have documented widespread use of cluster munitions by both government forces and armed groups in dozens of urban and rural locations, with some locations hit multiple times. The weapons used were ground-fired 300 mm Smerch (Tornado) and 220 mm Uragan (Hurricane) cluster munition rockets, which deliver 9N210 or 9N235 antipersonnel fragmentation submunitions. For example, there is evidence of cluster munitions having been used by government troops in attacks against Donetsk City (October 2014), Makiivka (August 2014), Stakhanov (January 2015), Komsomolske (December 2014 and February 2015) and Luhansk (January

[28] See OHCHR, report on the human rights situation in Ukraine, 16 November 2015 to February 2016, para. 6.

[29] International Committee of the Red Cross, "Ukraine: best practices in dead body recovery discussed in Lugansk" (23 January 2016), available from www.icrc.org/en/document/ukraine-crisis-best-practices-dead-body-recovery-discussed-lugansk.

and February 2015). Conversely, there is evidence of their use by armed groups in attacks against Artemivsk, Hrodivka and Kramatorsk (all in February 2015).[30]

58. While not taking responsibility for the use of cluster munitions by their own side, high-level officials on both sides of the conflict have condemned their use against civilians by the other party as barbaric savagery.[31] During a 24 October 2014 Security Council debate on the situation in Ukraine, 11 States expressed concern at the reported use of cluster munitions and called for an investigation (see S/PV.7287). While authorities in both Ukraine and the Russian Federation have condemned the use of cluster munitions in populated areas, neither Ukraine nor the Russian Federation has joined the 2008 Convention on Cluster Munitions. However, swift public condemnation of their use demonstrates the growing strength of the emerging customary norm against the use of cluster munitions by any actor under any circumstance, as it constitutes the use of an inherently indiscriminate weapon.

59. Ukraine is party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which establishes an absolute prohibition on the use of anti-personnel mines "under any circumstances". The Special Rapporteur notes with concern that Ukraine failed to fulfil its commitment to destroy all its stockpiled anti-personnel mines before 1 June 2010. According to its official reports, Ukraine still retains more than 5 million anti-personnel mines. The Special Rapporteur observed signs indicating the continued use of landmines on 12 September 2015, when he attempted to visit the facilities of the Mariupol Airport Base. The entrance to the base and surrounding perimeter had hazard signs warning of the presence of landmines.

60. The Special Rapporteur is concerned by the threat that unexploded ordnance and other explosive remnants of war pose against civilian lives, particularly children. The United Nations Human Rights Monitoring Mission in Ukraine verified numerous civilian casualties as a result of unexploded ordnance left in the battleground, both in Government-controlled areas and in territories controlled by the armed groups. The Special Rapporteur reminds the Government of its obligations under the Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V). According to the Protocol, which Ukraine ratified in 2005, State parties have to mark and clear, remove or destroy, as soon as feasible, all explosive remnants of war in territories under their control. In the event that explosive ordnance used by Ukraine remains in territory outside of its control, the Government has the obligation to provide assistance and information to facilitate the marking, clearance, removal or destruction of the ordnance by a third party. Throughout the hostilities, Ukrainian armed forces have the obligation to record and retain information on the use of explosive ordnance, in order to facilitate its clearance without delay after the cessation of hostilities.

61. More generally, the Special Rapporteur is worried by the extent to which reporting on the conflict is being instrumentalized by all parties using mechanisms that ought to be exercising an accountability function with respect to their own forces. Instead of responding to, investigating or prosecuting cases of indiscriminate shelling by their own military forces, each side is dedicating its time to documenting in laudable detail the violations of the other side with a view to continuing their confrontation in national or international courtrooms.

[30] Human Rights Watch, "Technical briefing note: cluster munition use in Ukraine" (June 2015).
[31] Ibid., p. 12.

B. Right to life in areas controlled by the Government of Ukraine

62. The "anti-terrorism operation" is being undertaken across the two regions of Donetsk and Luhansk; however, the "contact line" demarcating the boundary between territory controlled by the Government of Ukraine and territory not under its control runs through the middle of these two regions. During his visit, the Special Rapporteur was able to cross the "contact line", and so here presents his findings on the protection of the right to life on both sides.

1. Indiscriminate shelling

63. The Special Rapporteur is concerned by some of the weaponry used by forces on the Government side in the course of hostilities. Some of the weapons used are inherently insufficiently precise to be used within a highly urban and civilian-populated conflict zone. In other cases, weapons with a known level of precision are being used contrary to or without regard to proper standard operating procedures for targeting.

64. Moreover, he was not convinced during his engagement with relevant authorities that proper investigations had been conducted when allegations of civilian casualties were brought to their attention. The answer from some of the military authorities to questions about when an investigation into allegations of excessive civilian casualties would be triggered, was that such a situation would never arise, because there was an order by the Minister of Defence that this should not happen.

65. While the Special Rapporteur understands the difficulties of conducting investigations in territory outside the control of the Government's armed forces, such difficulties should not be understood, as suggested in many of the meetings he had, as a reason to reject any possibility of verifying civilian casualties caused by shelling or of assessing alleged violations of international humanitarian law. The conflict is being closely monitored by several international organizations, which publicly report the occurrence of civilian casualties on both sides of the "contact line". Combined with the military records of Ukraine on the use of artillery, and the possibility of contacting the families of casualties, morgues, hospitals or other sources for verification, it is possible for the Government to assess the damage caused by its use of artillery. Damage assessments conducted this way may not always establish evidence solid enough to allow accountability for violations of international humanitarian law, but credible estimations of civilian casualties would enable the armed forces to evaluate and strengthen precautionary measures taken to mitigate the impact of shelling on civilians.

66. Such basic analysis of the impact of the use of force during armed conflict is a vital first step in a process of accountability for violations of the right to life during armed conflict. At a minimum, all serious violations of international humanitarian law during armed conflict must be investigated and, where necessary, those identified as potential perpetrators must be prosecuted. As has been held by the European Court of Human rights, in particular with respect to indiscriminate shelling, the human rights protection of the right to life continues to imply that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force in the context of armed conflict.[32]

[32] See European Court of Human Rights, *Isayeva v. Russia*, application No. 57950/00, judgment of 24 February 2005, para. 209.

2. Detention

67. The Special Rapporteur received several allegations of secret detention, in which individuals claimed to have been detained for varying periods of time before being transferred to formal detention facilities. In some cases, this initial detention had taken place in undisclosed locations at the hands of officials thought to be of the Security Service of Ukraine; in other cases, individuals had been apprehended by members of the army or former volunteer battalions.

68. One facility that was mentioned frequently in that regard was the military base at Mariupol airport. During his visit to Mariupol, the Special Rapporteur attempted to conduct a pre-announced visit to this base; however, he regrets that, despite the advance notice, he was denied access to the facility. Other such detention facilities reportedly include the premises of the Security Service of Ukraine in Kharkhiv and Kramatorsk.

69. The existence of unacknowledged, secret detention facilities undermines the effective work being conducted by the national preventive mechanism and the Office of the Ombudsperson to ensure accountability with regard to violations against persons deprived of their liberty. It is disappointing that judges and prosecutors, who are in many cases presented with detainees who bear evidence or account of clear prima facie cases of ill-treatment do not respond more robustly to uphold the rights of detainees. The impunity that exists for acts of violence in such conditions poses a clear and direct threat to the right to life.

3. Alleged summary killings

70. The Special Rapporteur is concerned by reports of bodies discovered near Makiivka, in the Donetsk region, in September 2014. While several of these bodies appeared to be members of armed groups who had died in combat, some reportedly bore signs of having been executed after being detained by Government forces.

4. Integration of voluntary battalions in command and control

71. At the start of the conflict, Ukrainian Armed Forces were underprepared for the nature or the scale of the challenge that would confront them. Not all of the regular forces, to say nothing of the volunteer battalions, had been properly trained in military warfare, let alone the international humanitarian law standards that should regulate the conduct of hostilities.

72. The Special Rapporteur underlines questions concerning responsibility for the actions of volunteer battalions, both now that the majority have been formally incorporated into the Ukrainian Armed Forces or the Ministry of Internal Affairs, and during earlier stages of the conflict. Any extent to which the State is tolerating the existence of unaccountable, politically motivated armed militias on its territory is a concern. The extent to which the State has been actively collaborating with those militias in order to participate in joint military operations against a common enemy suggests that the responsibility of the State for the actions of the members of those groups may be even more direct.

73. These "battalions" in the armed conflict areas, and militias in the rest of the country, exercise coercive violence on behalf of the Government, and operate in a climate of impunity. This is partly a result of the pressure they exert on prosecutorial or judicial authorities, including the police, that attempt to pursue cases against individuals considered by these groups as "patriotic".

4. Impact of restrictions on movement on the right to life

74. The Special Rapporteur is concerned by the potential (and, in some cases, actual) humanitarian impact of the limitations imposed by the Government on free movement of people and goods across the "contact line". The long queues of vehicles that the resulting checkpoints inevitably entail have been targeted by shelling. The extent to which the barriers impede the transfer of vital medical supplies to hospitals on the eastern side of the "contact line" also raises serious questions about the appropriateness of the limitations.

C. Right to life in areas not controlled by Ukrainian authorities

75. As noted above, despite extensive efforts on the part of United Nations Human Rights Monitoring Mission in Ukraine, the Special Rapporteur was not able to meet with many representatives of the self-proclaimed "Donetsk people's republic" or "Luhansk people's republic".

1. Indiscriminate shelling and the positioning of artillery in civilian areas

76. Allegations have been made that the forces on the side that is not controlled by the Government are deliberately positioning their artillery within close range of built-up civilian areas and occupying hospitals and schools, so as to effectively use civilians as a shield, or to entice government troops to cause civilian casualties and damage to civilian infrastructure, which can then be used for political purposes.

77. The salience of this problem is demonstrated by the extent to which local populations have taken to the streets to protest it. For example, there are reports that protests were held for this reason in Donetsk on 15 and 16 June 2015.[33] In situations in which people are reportedly reluctant to express dissent, this speaks to the severity of the threat to life posed by these tactics.

2. Summary executions of detainees

78. There are allegations of the killing of detainees held by fighters of the self-proclaimed "Luhansk people's republic" in Sievierodonetsk, as the fighters were retreating from the city in July 2014. While local police remained in control of their headquarters on Partyzanska Street, the fighters had taken over the police temporary detention facility next door. On the day of the retreat, police reported hearing shots fired from within the facility. Several hours later, after the Ukrainian forces had arrived, the police re-entered the facility, and discovered and documented two corpses in separate cells, each shot either in the neck or in the head.[34]

3. Allegations of quasi-judicial executions

79. The Special Rapporteur was alarmed by allegations of executions in quasi-judicial circumstances, both in the context of "military justice" and in more civilian, "criminal justice" contexts. For example, it is alleged that in May 2014 the "minister of defence" of the self-proclaimed "Donetsk people's republic", Igor Strelkov (Girkin), sentenced two

[33] See OHCHR, report on the human rights situation in Ukraine, 16 February to 15 May 2015, para. 72. See also "Donetsk residents stage rare anti-war protest", Radio Free Europe/Radio Liberty, 16 June 2015, available from www.rferl.org/media/video/ukraine-donetsk-protest/27074790.html.

[34] Amnesty International, "Summary killings during the conflict in eastern Ukraine" (London, 2014), p. 10.

local commanders to death by firing squad for looting, armed robbery, kidnapping and desertion.

80. Summary executions may have been carried out under the pretext of "criminal legal authority". In July 2014, when the Government of Ukraine regained control of Sloviansk, documents were found in the Security Service of Ukraine Building, which had been used as a detention facility by armed groups of the self-proclaimed "Donetsk people's republic", that seemed to indicate that armed groups had given death sentences and carried out executions of at least three persons, reportedly based on legislation dating back to 1941.[35]

81. On 18 August 2014, the self-proclaimed "Donetsk people's republic" announced the adoption of a criminal code that would enter into force on the same day. The code is based in the criminal code of the Russian Federation, and includes the application of the death penalty in cases of aggravated murder.[36] However, lawyers with whom the Special Rapporteur met in Donetsk stated that the "constitution" of the self-proclaimed "Donetsk people's republic" proclaimed the right to life and that the imposition of capital punishment as provided in the "criminal code" would thus be incompatible with it.

4. Threats against certain groups

82. Amnesty International found strong indications that alleged drug dealers had been executed by forces of the self-proclaimed "Luhansk people's republic" in the area of Sievierodonetsk. On 3 June 2014, their commander, Oleksii Mozhovyi, had publicly threatened anyone involved in drug trafficking. On 13 June 2014, the police found three bodies of suspected drug dealers.[37]

83. In May and July 2014, there were reports of summary executions by self-proclaimed "Luhansk people's republic" forces in the area of Sievierodonetsk, Rubizhne and Lysychansk, in the Luhansk region.

5. Targeting of those *hors de combat*

84. As reported by the United Nations Human Rights Monitoring Mission in Ukraine, on 19 August 2014 part of the town of Ilovaisk came under the control of Ukrainian armed forces. By 27 August, the Ukrainian troops in Ilovaisk had been surrounded by the armed groups of the self-proclaimed "Donetsk people's republic". The same day, a humanitarian corridor was negotiated for Ukrainian forces to leave the town. However, at least one column of Ukrainian troops was heavily shelled while leaving Ilovaisk, killing several hundred Ukrainian servicemen, many of whom were wounded soldiers being evacuated.[38] On 14 August 2015, the Ukrainian Chief Military Prosecutor stated that the total losses among the Armed Forces of Ukraine, the National Guard and personnel of the Ministry of Internal Affairs in the incident were 366 killed, 429 injured, 128 captured and 158 missing.

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[35] Evidence of the application of 1941 Union of Soviet Socialist Republics martial legislation by illegal armed groups associated with the self-proclaimed "Donetsk people's republic" to carry out executions was posted online. See Christopher Miller, "Soot-stained documents reveal firing squad executions in Ukraine" (10 July 2014), available from http://mashable.com/2014/07/10/evidence-of-execution-trial-discovered-in-the-rubble-of-rebel-headquarters-in-ukraine. The Special Rapporteur received the same allegations from officials of the Security Service of Ukraine when he met with them during his visit, on 9 September 2015 in Kyiv.

[36] See OHCHR, report on the human rights situation in Ukraine, 16 September 2014, para. 9.

[37] Amnesty International, "Summary killings during the conflict in eastern Ukraine", p. 9.

[38] Alec Luhn "Anatomy of a bloodbath" *Foreign Policy* (6 September 2014), available from http://foreignpolicy.com/2014/09/06/anatomy-of-a-bloodbath.

85. In January 2015, following the shelling of a bus station in which several people were killed, Oleksandr Zakharchenko, "head" of the self-proclaimed "Donetsk people's republic", made a statement on television announcing that his troops would give no quarter and take no soldiers of the Ukrainian forces as prisoner. Making such a statement is a war crime. However, available evidence does not seem to indicate that this policy was implemented.

86. Also in January, Ukrainian soldier Ihor Branovytskyi was allegedly summarily executed while in captivity by the armed groups of the self-proclaimed "Donetsk people's republic". Branovytskyi was among a group of 12 soldiers captured and taken to the base used by the so-called Sparta battalion and severely beaten. When Mr. Branovytskyi collapsed and fainted, he was reportedly executed by the battalion commander Arsenii Pavlov (call sign "Motorola").[39] During a meeting with the "office of the commissioner for human rights" of the self-proclaimed "Donetsk people's republic", the "deputy ombudsperson" agreed to investigate this case.

D. Downing of Malaysia Airlines flight MH17

87. On 17 July 2014, a passenger airliner, Malaysia Airlines flight MH17, en route from Amsterdam to Kuala Lumpur, was shot down over the Donetsk region by a missile that had been launched from the ground, killing all 298 persons on-board and becoming one of the most tragic events in the ongoing conflict. On 23 July 2014, the Government of Ukraine delegated the investigation to the Dutch Safety Board, which led an international team of investigators from Malaysia, Ukraine, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Australia and the Netherlands. Despite initial difficulties in securing access to the site, on 13 October 2015 the Dutch Safety Board published its report, which concluded that the crash of the flight had been caused by "a 9N314M-type warhead launched from the eastern part of Ukraine using a Buk missile system".[40] However, the Board claimed that further investigation was required to verify the exact location of the launch, which it could only place within an area of 320 square km. The Board did not have the mandate to identify who had launched the missile. A criminal investigation to hold the perpetrators accountable is ongoing, with the participation of the Governments of Ukraine, the Netherlands, Belgium, Malaysia and Australia.

88. The Special Rapporteur was shocked that a civilian airliner could be targeted in this fashion. He welcomes the investigation work done by the Dutch Safety Board, calls for sustained investigative efforts and hopes that the outcome serves as a reliable basis for accountability and provides relief to the families of the victims.

VII. Conclusions and recommendations

A. Overall remarks

89. **The challenges faced by Ukrainian society are real. There are fundamental divisions concerning its geopolitical orientation, which have polarized national identities. A brutal armed conflict with strong international dimensions is further**

[39] See OHCHR, report on the human rights situation in Ukraine, 16 February to 15 May 2015, para. 31.

[40] Dutch Safety Board, "Crash of Malaysia Airlines flight MH17" (13 October 2015), available from www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf.

undermining the young national fabric that Ukraine has achieved since its independence. In recent years, against a background of deteriorating economic, social and political conditions, the country has experienced massive demonstrations, which have been manipulated by various political forces and resulted in bloodshed. There is no established tradition of accountability for violations of the right to life or other human rights on which to draw. The current conflict has exacerbated structural weaknesses.

90. The Special Rapporteur shares the concerns expressed by the families of the victims, the Council of Europe and the United Nations Assistant Secretary-General for Human Rights, who, in remarks to the Human Rights Council on 22 March 2016, expressed particular concern about "the lack of progress in the investigations and proceedings into the killings that happened [in Maidan], as well as the killings on 2 May 2014 in Odesa and 9 May 2014 in Mariupol," adding that "the slow progress in these cases undermines public confidence in the criminal justice system. It is essential that they be addressed promptly and with impartiality."[41]

91. Long-term security will depend on the extent to which a fully functioning system of rule of law, based on the effective protection of the human rights of all persons living in Ukraine, without discrimination, is gradually established. The approach that the Special Rapporteur saw too often during his mission was that, when asked about human rights protection, one side immediately invoked the transgressions of the other. Human rights are being treated as an instrument with which to assail the opponent, not as a shared system of values and accountability. It is the view of the Special Rapporteur that this approach to human rights is lethal; a new paradigm must be found if Ukraine is to escape from the current vicious cycle of violence.

92. The sad truth is that serious violations occur at one point or another in all societies. Ukraine is no exception, and the real question should be how to deal with the violations that occur. Many officials with whom the Special Rapporteur met during his visit, particularly within the Security Service of Ukraine, simply denied any wrongdoing and pointed to the fact that there were laws in place that met international standards. There is little hope for progress where this is the approach.

93. Being realistic and open about the fact that violations may occur is the first step towards addressing them. The second—and decisive—step is to create and utilize mechanisms of accountability to address those violations.

B. Recommendations to all parties involved in hostilities in eastern Ukraine

94. Efforts by all parties to end the armed conflict in the eastern part of the country should be renewed. The ceasefire should be observed and monitored. As long as hostilities continue, all parties must take concrete measures to reduce civilian casualties and adhere strictly to the requirements of international humanitarian law relating to distinction, proportionality and precaution in combat.

95. Proper internal measures of reporting on exchanges of fire should be established. Targeting should be guided by international humanitarian law standards, and be adjusted based on regular assessments of its impact. Allegations of breaches of international humanitarian law must be impartially and independently investigated.

[41] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18534&LangID=E.

96. **It is of great importance to move the conflict out of urban and populated areas. All parties to the conflict should refrain from using weapons that do not allow sufficient precision in this context. They should also refrain from installing their weaponry or artillery pieces in the vicinity of inhabited areas, to say nothing of avoiding schools, hospitals, kindergartens or similar locations.**

97. **The events at Ilovaisk in August 2014 must be independently and impartially investigated and any perpetrators brought to justice.**

C. Recommendations to the Government of Ukraine

98. **Ukraine should ratify the 2008 Convention on Cluster Munitions. In the statements of the Government on the use of such weapons by opposing armed groups, the Government has strengthened the idea of an emerging norm against the use of cluster munitions under any circumstance. All parties should immediately desist from the use of such inherently indiscriminate weapons.**

99. **All remaining illegal volunteer battalions and militias must be disbanded and disarmed, or effectively integrated into the regular armed forces, with effective control and accountability.**

100. **Likewise, ultranationalist groups and other armed militias, such as Pravyy Sektor, Svoboda and "Self-defence", should be declared illegal and effectively disarmed, disbanded and prosecuted, or brought under the control of the law. Acts of violence or intimidation by leaders and members of these groups must not be tolerated by the Government at any level, and their incitement to violence and hatred against other communities should be sanctioned.**

101. **A system of independent oversight of all those who perform law enforcement functions must be established, focusing in particular on allegations of ill-treatment by the Security Service of Ukraine. This mechanism should be empowered to conduct investigations into suspected informal detention facilities, including by granting it comprehensive power of search within military or Security Service of Ukraine facilities.**

102. **The investigations into the events at Maidan in February 2014 and into the events in Odesa on 2 May of the same year must be completed as a matter of priority, and accountability for loss of life established. The systemic failures that contributed to the eventual loss of life, such as the low profile of the police and the delayed response of the fire brigade in Odesa, should also be investigated and, where appropriate, rectified.**

103. **The difficult situation and suffering of the families of those who lost their lives should be acknowledged by the Government. Their safety, physical and psychological well-being, dignity and privacy must be protected, and they must be promptly informed of progress in the investigations. Public officials must treat them with respect.**

104. **The Government of Ukraine should consider, in accordance with its standing invitation to all thematic special procedure mandate holders, inviting official country visits from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the independence of judges and lawyers.**

105. **The reservations that the Government has submitted with respect to compliance with the International Covenant on Civil and Political Rights and the European Convention on Human Rights must be reconsidered on a regular basis.**

106. **The mandate of the Office of the Ombudsperson must be strengthened, including by giving it clear oversight of all places of detention or interrogation, defined broadly as any place in which State officials have (or the Ombudsperson suspects that they have) the ability to detain an individual for any purpose, including questioning.**

107. **Judges and other court officers must be protected against intimidation.**

108. **As evidence of a restored, credible system of justice, independent and impartial investigations should be conducted into the individual cases highlighted in the present report.**

109. **The human rights situation in Crimea must remain under the scrutiny of international monitoring bodies. The Governments who control access to the territory—Ukraine and the Russian Federation—must grant full access to such monitors. However, even without such access, the monitoring must continue.**

D. Recommendations to international entities

110. **The United Nations Human Rights Monitoring Mission in Ukraine should continue its human rights monitoring in all parts of the country, with a view to verifying human rights violations, bring such violations to the attention of the authorities, encourage corrective action and make its findings public on a regular basis. The Mission should be allowed to monitor the human rights situation in Crimea to establish accurate information to counter false information, rumours or propaganda.**

111. **The OSCE Special Monitoring Mission to Ukraine and other relevant entities should continue monitoring the military situation in Ukraine and applying pressure to all relevant parties to take steps to de-escalate, disengage and ultimately end the conflict.**

E. Recommendations to civil society

112. **The Special Rapporteur commends independent civil society organizations in Ukraine for their work documenting violations of international human rights and international humanitarian law, and underlines the importance of that work in supporting both his mission and the ongoing work of United Nations Human Rights Monitoring Mission in Ukraine. He encourages civil society to continue its efforts, with impartiality and in close cooperation with victims of violations and abuses committed by all sides.**